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<b>Meaning of—Person migrated to Pakistan after 15th August, 1947 and was residing there—S. 8 (1)(b) if can be utilised for ascertaining the meaning of expression "Evacuee",</b>	

A person who had migrated to Pakistan after 15th of August, 1947 and was residing in Pakistan was also covered by cl. (ii) of s. 2(c) of U P Ordinance No 1 of 1949. The provision was, however, not applicable if after migration the person settled down in country other than Pakistan. S 8(1)(b) of the Act cannot restrict the scope and meaning of the expression "evacuee" or "evacuee property". Any new provision in a subsequent enactment cannot be utilised to restrict the general scope of the provisions in the earlier enactment.

*Ashiq Khan v Assistant Custodian General, Evacuee Property*

**Aligarh Muslim University Act, 1920, ss 36(2) and 36-B—**  
*Order of Tribunal—Student barred from taking admission in University—Suit for setting aside the order—Not maintainable*

The various provisions of the Aligarh Muslim University Act provide complete machinery for redress of the grievance of a student. Various Tribunals under the statute provide forum for determination of all disputes between the University and the students in respect of the rights and liabilities created under the provisions of the Act. Sub-s. (2) of s. 36 makes the order of the Tribunal final and further lays down that no suit shall lie in any court in respect of the matter decided by the Tribunal. By virtue of sub-s. (2) of s. 36-A finality attaches to the order of Tribunal of Arbitration in a disciplinary action against a student and a civil suit to challenge the order of the Tribunal is expressly barred.

*Aligarh Muslim University, Aligarh v Munsif, Koil, Aligarh*

**Central Ordinance No. XII of 1949 and XX of 1949, ss. 5 and 6(1)(2)—Evacuee property—Automatic vesting of—Notification under s. 6(1) issued at latter stage—Effect of**

S 5 contemplates automatic vesting of the properties of evacuee in the custodian and under s. 6(2) the Custodian can take action after the vesting of the evacuee property, not necessarily after issue of notification. Issue of notification under s. 6(1) is distinct from the vesting of evacuee property under s. 5. The effect of delay in the issue of notification is that the claimants can raise objection even at a much later stage.

*Ashiq Khan v Assistant Custodian General, Evacuee Property*

**Civil Service—Fundamental Rules, r 56—Proviso (i); Civil Service Rules, r. 460—Retirement under, if can be termed as forced retirement within the meaning of r. 28(i)(vii) of U P Rules of Business framed under Art. 166(3) of the Constitution of India so as to require the submission of file to the Chief Minister—Forced retirement—Meaning of.**

Superannuation retirement can by no stretch of imagination be called as "forced retirement" though it may fall within the expression "compulsory retirement" used in the terminology of the service rules. Retirements under the proviso to F R. 56 and Civil Service Regulation 460 which stand on the same footing as superannuation retirements inasmuch as none of them involves any penal consequences, are also not "forced retirements" within the meaning of item (vii) of sub-r (1) of r. 28 of U. P. Rules of Business framed under Art 166(3) of the Constitution of India.

Expression "forced retirement" used under r 28(1)(vii) of the U P Rules of Business can only mean retirement which is forced on a gazetted servant as a measure of punishment.

*Held*, the mere fact that the decision to retire the respondent was taken at the level of the Irrigation Minister and the file was not submitted to the Chief Minister does not invalidate the order of retirement passed under proviso to r 56 of the Fundamental Rules.

State of U P v K S Bhatnagar

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**Code of Civil Procedure, 1908, s 115 and s 6 of the U. P. Civil Laws Amendment Act, 37 of 1972 and Constitution of India, Art 14—S 6 of the U P Act 37 of 1972 not ultra vires of the Constitution of India—Not violative of Art. 14.**

If the Legislature considered that an order of a District Judge may not be open to revision before the High Court if the order arises out of a suit valued at below a certain amount, it does not result in discrimination but can be justified on the doctrine of permissible classification as it is based on an intelligible differentia which has a rational relation to the object sought to be achieved.

S. 6 of the U P Act 37 of 1972 is not violative of Art. 14 of the Constitution.

Parsidh Narain Pande v Kalap Nath

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**Code of Criminal Procedure, 1898, s 145—U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 209—Possession of the Receiver enures for the benefit of the real owner—Trespasser cannot take that period as his own for the purposes of limitation.**

The possession of the court or of a Receiver under s 145, Cr P C. enures for the benefit of the real owner. If it is found that the trespasser was actually in possession on the date of the preliminary order, then the effect of the Court's possession thereafter is to effect an interruption in his possession. The trespasser cannot count the period of possession of the Court or the Receiver as his own possession for the purposes of limitation for a suit for ejectment or possession.

Aneg Singh v Ram Nath

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—, 1898, s. 145—*Existence of breach of peace challenged—Magistrate to record a finding—Proceedings to be dropped if no such apprehension.*

Where the existence of the apprehension of the breach of peace is challenged and evidence is led, the Magistrate must record a finding one way or the other because the very foundation of the jurisdiction of a Magistrate in cases under s. 145, Cr. P. C. is based on the existence of a dispute giving rise to apprehension of breach of peace. As soon as the apprehension of breach of peace ceased to exist or if it never existed the jurisdiction of the Magistrate to proceed with the case ceases and the only order he has to pass is to drop the proceeding and, to release the property in dispute.

—, ss 145(5) and 146—*Reference to the Civil Court—Cancellation of preliminary order subsequently*

The Magistrate, even after the reference has been made, has power to proceed under s. 145(5), Cr. P. C. and to cancel the preliminary order if the situation so demands

*Sankatha Singh v Rahmat Ullah*

—, 1898, s. 369—*Judgment—Finality of—Principle does not apply to interim or interlocutory orders*

S. 369 only precludes alteration of final judgment and keeps intact the power of a court to pass different orders from stage to stage in so far as an interim or interlocutory matter is concerned.

—, 1898, s. 423(1)(a)—*Appeal against acquittal—Acquittal set aside and case remanded for retrial—Retrial, if means "de novo trial"—Word "retried"—Meaning of*

A retrial as a result of an order of remand, may be from the stage of illegality and not necessary from the beginning. The word "retried" occurring in cl (a) is of wide amplitude, and gives a discretion to the appellate court either to order a *de novo* trial, if the exigency of the situation so demands, or from the particular stage where the illegality was committed or serious irregularity materially prejudicing an accused occurred, and it does not fetter the court's discretion in any manner. The object is to subserve the ends of justice and how that object will be achieved, will be dependent upon the peculiarity of each case.

The stage from which it should start will invariably be indicated in the appellate judgment itself

*Desh Raj v State*

**Constitution of India, Art 226—Writ—Practice and procedure—New allegations of fact in rejoinder affidavit—Permissibility of.**

A new allegation of fact cannot be made in the rejoinder affidavit without the permission of the court unless it was in reply to some facts disclosed in the counter affidavit. If a new fact is allowed to be introduced in the rejoinder affidavit, opportunity ought to have been given to the other side to file a further counter affidavit in relation to that fact.

State of U. P. v. K. S. Bhatnagar . . . 17

**Fundamental Rules, r. 56 amended by U. P. Fundamental Rules, r. 56 (Amendment and Validation) Act, 1970, Provision (1) and expl. (1)—Compulsory retirement under public interest—Presumption—Burden of proving otherwise lies on the servant—Executive instructions—Statutory force of.**

R. 56 of the Fundamental Rules requires that after a Government servant attains the age of 55 he can be retired by the appointing authority at any time on giving him three months' notice or salary in lieu thereof without assigning any reason. Such a decision would be taken by the appointing authority if it appears to that authority to be in public interest though it need not be recited in the order. The rule does not lay down that if the appointing authority on the eve of a government servant attaining the age of 55 has once taken decision that he may be allowed to continue up to the age of 58 it cannot subsequently change its mind and retire him at any time before he attains the age of 58 if such retirement appears to that authority in public interest.

Executive instructions issued under explanation (1) can have no statutory force in view of Full Bench decision in *Iqbal Narain v. State*. An order of retirement, if challenged, has to be looked into whether or not it is in public interest, with an initial presumption that such order is in public interest and placing the burden on the servant to prove that it is not in public interest.

State of U. P. v. K. S. Bhatnagar . . . 17

**Indian Income Tax Act, 1961, s. 56—Dharmada received under custom—Not an income of the assessee**

When it was not disputed that the petitioner received *dharma* under a custom according to which it was obligatory upon it to spend the amount so collected on charity alone and he had created a fund for that purpose and had credited to that fund the amount so collected, *held*, that it was not received by the assessee as its income.

Thakur Das Shyam Sunder v. Additional Commissioner, Income-tax . . . 97

**Indian Railways Establishment Code, Vol. II, r. 2046(1)—Railway servants recruited on or after 1st April, 1938—Age of superannuation for.**

The railway servants recruited on or after 1st April, 1938 cannot be equated with their counterparts substantively appointed before that date on a ministerial post either by the Indian Railways or by an ex-company or ex-State railway. The dividing line between these two classes of servants is the date line of 31st March, 1938 for the purpose of determining their age of superannuation. This dividing line has a rational nexus with the object sought to be achieved by this classification.

S. D. Manik *v* Union of India . . .

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U, P. Excise Act, 1910, ss. 7 and 71—*Possession of intoxicant without licence or permit—Licensee and person actually in possession can be prosecuted.*

S. 71 of the Act makes it clear that for possession of an intoxicant without any licence or permit not only can the licensee be prosecuted but also the actual offender, that is the person actually in possession thereof.

State *v* Mahendra . . .

U, P. Government Servants Conduct Rules, 1956, r. 29—*Constitution of India, Art. 311(2)—Police Sub-Inspector marrying again during the life time of his first wife—Sub-Inspector treated as a corrupt officer—Termination of service—Art 311(2) not attracted.*

Where the dominant intention appears to have been to terminate the services of the appellant because he was found unsuitable to be retained in service, *held*, that the order does not seem to be founded directly or proximately on allegations that the appellant married two wives against Government Servants Conduct Rules. The impugned order cannot be characterised as imposing the punishment of dismissal or removal from service. The order on its terms is innocuous and does not cast any stigma. Art. 311(2) is therefore not attracted.

Nepal Singh *v* State of U. P. . . .

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U, P. Imposition of Ceiling on Land Holdings Act, 1960, s. 3-A—*Child in womb on the date of enforcement of the Act—Born after the commencement of the Act—Cannot be taken into account for determining the family.*

The doctrine that a Hindu undivided family comes into existence from the date a son is conceived is not of universal application and cannot be invoked in determining ceiling area of the tenure-holder under the Act.

Normally, an unborn child, even if in the womb, is not taken or counted as a member of the family.

State of U. P. *v* Dhan Singh . . .

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U. P. Town Areas Act, 1914, s. 6-K and Rules, r. 48—*Elected Chairman of Town Area dismissed employee from Police Force—No evidence that he was debarred from em-*

*ployment—No disqualification for being chosen as Chairman, Town Area*

There seems to be no manner of doubt that the language used in r 48-C is comprehensive enough to include even such candidates who are disqualified under s. 6-F

The question as to whether the appellant had been dismissed in such a manner that he was not desued to be re-employed elsewhere cannot be made the subject-matter of surmises. It has to be proved as a fact that he was a person who had been dismissed with the desue not to be re-employed elsewhere

*Held*, that as the necessary ingredients of s. 6-K of the Act were not proved the Election Tribunal committed a manifest error of law in taking the view that the appellant was disqualified for being elected as Chairman

*Sarfaraz Ahmed Khan v Election Tribunal*

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**U, P. Zamindari Abolition and Land Reforms Act, 1950, ss. 6 and 9—Building site—Vesting of—Word “held”—Meaning of**

Under the terms of this agreement the land on which these shops were constructed belonged exclusively to the plaintiffs, while the shops, constructed on that land belonged to the defendant-appellant and that both the parties could not be held to be the joint owners of the shops or the land. Once it is found that these shops belonged to the defendant then site would be deemed to be settled with them under s. 9. If a building is found to belong to a person the question of its being “held” within the meaning of s. 9 does not arise. Ordinarily, a building is held by the same person to whom it belongs. If, however, it belongs to one person but is held by another the latter would hold it either by virtue of an inferior right granted to him by the owner, for example, as a tenant or he would hold it adversely against the owner. In either case the settlement shall not be deemed to be made with him within the meaning of s. 9.

—, 1950, s. 6(a)(1)—*Expression “Abadi sites” includes sites covered by building*

There are no qualifying words before the expression “abadi sites” and as such it would govern both the vacant sites as well as the sites covered by building.

*Harī Shanker v Mahendra Pratap Bahadur Singh*

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Where in answer to the execution petition the judgment-debtor filed objections by initiating proceedings under O XXI, r 2(2), C P C and the parties and the Court had proceeded on the basis that the entire question related to a controversy in respect of execution, discharge and/or satisfaction of the decree, *held* that the Court had under s 47(2) power to treat the said proceedings as a suit

—, O 43, r 1, cl (4) and s 105 (2)—*Order of remand by appellate Court—No appeal preferred against it—Finding of trial court after remand order becomes final*

Under O 43 r 1 cl (4), C P C an appeal lies against an order remanding a case where an appeal would lie from the decree of the appellate court

Where it is clear that the respondent should have filed an appeal against the decisions given after remand becomes final, its correctness cannot be disputed subsequently

Sita Ram Goel v Sukhnandi Dayal ... 146

*Constitution of India, Art 164 (4)—Appointment of Chief Minister—No qualification prescribed—Council of Ministers collectively responsible to Legislative Assembly*

Under cl. (1) of Art 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They will hold office during the pleasure of the Governor. Cl. (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Ministers, but cl. (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf.

Har Sharma Varma v Tribhuvan Narain Singh, Chief Minister

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— Art. 226 and Municipalities Act, 1916, s. 30—Reasons for supersession given in order—Reasons must be germane to and not extraneous or irrelevant to the charges—High Court will not look into the sufficiency of reasons

The reasons stated in the supersession order must be germane to the controversy involved in the charge and should not be extraneous or irrelevant to that controversy. If the reasons are wholly irrelevant and not germane to the controversy in the sense that they do not show the inadequacy or unsatisfactoriness of the explanation submitted by the Board and lead to an inference about the correctness of the charge, they shall not be deemed to be the reasons contemplated by this section. Once the reasons have been so stated by the Government for passing the order of supersession, this Court will not look into the sufficiency or otherwise of those reasons and will not substitute its own judgment for the judgment of the Government for taking the action.

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*Contract Act, 1872, s. 230 (3)—Contract void and unenforceable.*

Where the contract was entered into without complying with the requirements of Art 299(1) of the Constitution the question of ratification could not arise because on the view which has already been followed such a contract is void and is not capable of ratification.

State of U. P. *v* Murari Lal and Brothers Ltd .

**Hindu Marriage Act, 1955, s 10(1)(a) read with Explanation—**  
*Decree for judicial separation—Desertion for two years—*  
*Desertion includes wilful neglect.*

Under s 10(1)(a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage.

Where the wife had left her husband's home in 1947 and thereafter consistently refused to return to her husband notwithstanding the fact that she had been properly treated when she lived with him and the subsequent marriage of the husband with another woman had no impact on the wife held that the wife had left originally with the object of bringing cohabitation to an end and the desertion on her part continued throughout without any reasonable cause.

Rohini Kumari *v* Narendra Singh ..

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**Indian Arbitration Act, 1940, s 14(2)—Application under—**  
*No prayer for summoning the award or for direction to*  
*arbitrator to file the award—Maintainability of—Bringing*  
*the award on record—Methods for*

The award can be summoned by the Court from the arbitrator *suo motu* under s 14(2) if by any means the fact of making of an award comes to the Court's notice and the making of an application under s 14(2) containing a prayer for summoning the award is not a condition precedent or necessary to the exercise of such a power by the Court. The award may be produced before the Court by the arbitrator also *suo motu* without either any party to the agreement making a request or without the award being summoned by the Court. In either case, whether the award is filed before the Court on being summoned on an application by a party under s 14(2) or on the award being filed by the arbitrator *suo motu* or on the award being summoned by the Court *suo motu*, the Court must proceed to give notice of filing of the award to the parties and act under s 17. The Court must pass a decree in terms of the award when it sees no cause to remit or set aside the award.

—, 1940 ss. 14(2), 17 and Limitation Act, 1908, Art 178—  
*Applicability of—Award filed beyond the statutory period*  
*of 90 days—Effect of*

The limitation of 90 days under Art 178 of the Limitation Act, 1908, for filing the award is confined only to those cases in which the award is filed by the arbitrator at the request of a party to the arbitration agreement after the arbitrator or umpire has given notice in writing to the parties of the making and signing of the award. But Art 178 will not govern an award which is filed by the arbitrator either *suo motu* or on the *suo motu* direction of the Court in the absence of an application under s 14 of the Act.

——, 1940 s 14(1) 2) and Limitation Act, 1908, Art. 178—  
Application for filing of award in Court—Limitation for—  
Starting point of—Notice under s 14(1)—Service of—Mode  
for

An application under the Arbitration Act, 1940, for filing in the Court of an award has to be made within 90 days "from the date of service of the notice of the making of the award". The signing of the award by the parties and their counsel did not amount to notice both under Art 178 of the Limitation Act 1908 and also under s 14(1) of the Arbitration Act. Limitation under Art 178 does not start from the date of knowledge but from the date of service of the notice of the making of award. Knowledge will not be the *terminus a quo*. The starting point of limitation will be the date of service of the notice in writing. The notice under s 14(1) is a notice required by the Act to be served by the arbitrators or umpire.

Service must be made primarily in accordance with the mode of service agreed to between the parties in their arbitration agreement, and if there be no such provision in the arbitration agreement, then in either of the two manners prescribed by s 42 of the Arbitration Act.

District Co-operative Development Federation Ltd.,  
Pratapgarh v Ram Samujh Tewari (F B)

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**Transfer of Property Act, 1882, s 60 and Code of Civil Procedure, 1908, O 1, r 9 and O XXXIV, r 1—Right of co-mortgagor to redeem mortgaged property—Suit for redemption—Non-impleading of co-mortgagors, when not fatal to the suit.**

The provisions of O XXXIV r 1, C. P. C. are subject to the provisions contained in O 1, r 9.

Where, the integrity of the mortgage having broken, a co-mortgagor wants to redeem his own share it is necessary for him to implead the other co-mortgagors also because in their absence his share cannot be determined and without the determination of his share he cannot be permitted to redeem the entire mortgage. In such a case he is entitled to redeem only to the extent of his own share. So the defect of non-joinder of his co-mortgagors in the suit, either as co-plaintiffs or as *pro forma* defendants, may be fatal resulting in the dismissal of his suit.

But where the integrity of the mortgage is intact and one of the co-mortgagors wants to redeem the entire mortgaged property, the other co-mortgagors should be impleaded as proper parties, but their non-impleadment is not fatal to the suit. All the controversial matters between the mortgagee and the mortgagor can be effectively decided between the parties who are before the Court within the meaning of O 1, r 9 of the Code of Civil Procedure. In such a case the defect of non-joinder of other co-mortgagors will not be fatal.

Ramesh Chandra v. Iulsi Ram

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**U. P. Encumbered Estates Act, 1934, ss 23-A and 23-B—U P Zamindari Abolition and Land Reforms Act, 1950, s 70 and U P Zamindari Abolition and Land Reforms Rules, r. 77—Judgment-debtor cannot take away compensation money or bonds**

Ss 23-A and 23-B of the 1934 Act requires that the amount of the bonds on account of compensation or rehabilitation grant received by the Collector shall be expended or utilised by the Collector in liquidation of the amount of the secured debt. Under s 23-B of the 1934 Act the bonds are received by the Collector in pursuance of the requisition under s 23-A of the 1934 Act. The absence of the service of a requisition cannot confer a right on the judgment-debtor to take away the compensation money or bonds.

*Held* that the Board of Revenue rightly gave directions to the Compensation Officer to hand over the bonds reported to be remaining with him for the liquidation of debts to secure compliance with the provisions of the statute and performance of statutory duty by the Collector as well as the Compensation Officer and the appellants were not entitled to receive the bonds without satisfying the decree.

Azmat Azim Khan v Board of Revenue, U P.

133

**U. P. Municipalities Act, 1916, ss 10-A and 30—Municipal Board—Supersession of, during its extended term**

There is nothing in the language of s. 30 of the Act which debars the Government from taking action against a Board after its term has been extended under the proviso to s 10-A (1).

— *Term extended during the pendency of proceedings under s 30—Delay in passing final orders—Inference from*

Under the circumstances of the present case if no final order under s 30 could be passed for about 4 months it cannot be inferred merely from this delay in the absence of any time-limit prescribed by law for disposal of such cases like the time-limit fixed by s 180(3) of the Act, that the proceedings had been dropped and the default, if any, of the Board had been condoned by the Government.

— S 30—*Words and Phrases—Expression “wilful default”—Meaning of*

In context of s 30 of the Act the expression “wilful default” means a failure to perform duty arising out of the Board’s lack of willingness or its disinclination to perform that duty and such failure should not be the result simply of any accident, inadvertence, carelessness or negligence

State of U P v Krishna Chandra Gupta

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U. P. Zamindari Abolition and Land Reforms Act, 1950, s 20—*Introduction of—Amendment, of s 209 in 1962—Not retrospective—Suit instituted before the amendment—State Government not a necessary party*

The amending Act no 21 of 1962 does not make the amendment retrospective either expressly or by necessary intendment. The State Government is not a necessary party to the suits under s 209 of the Act instituted prior to the date on which the amendments came into force and which were pending and such a suit could not be dismissed for non-implemment of the State Government

Smt Munia v Board of Revenue, U P.

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—, 1950, s 39(1)(c)—*Gross assets of a Mahal—Determination—“Sayer”—S 3(26).*

The Sayer income during ten agricultural years immediately preceding the date of vesting should be taken into consideration in determining the gross assets under s. 39 of the Act

The income derived by the landlord from persons who have been given licences to cut and remove Poola grass from forest would be Sayer

—, 1950, s 39(1)(e)—*Computation of average annual income from forest*

The two clauses in s 39(1) (e) are independent methods of finding out the average annual income from forest. The Compensation Officer cannot adopt either of the two clauses. He has to refer to both the clauses. The Compensation Officer is to compute the average income by taking recourse to both the methods. The second clause which speaks of appraisement of the annual yield will be done *inter alia* by taking into consideration the number and age of trees, the area of cultivation and produce.

Ganga Devi v. State of U. P.

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—, 1950, ss 171, 174 and 175 and Hindu Succession Act, 1956, ss 25 and 27—*Bhumidhari and sirdari land—Succession—Ss 24 and 27 of the Hindu Succession Act, 1956 not applicable to inheritance under the Tenancy Act.*



The law of succession contained in the U. P. Zamindari Abolition and Land Reforms Act cannot be altered or changed in the statute itself. When the Legislature laid down a particular line of succession and did not provide for the exclusion of any one in that line on any ground then it is not permissible to engraft exceptions or exclusions on the ground of equity, justice and good conscience. Rules of equity, justice and good conscience are applicable when the matter is not governed by the statutory provisions.

The provisions of ss 25 and 27 of Hindu Succession Act apply only to succession under that Act and not to succession under other enactments.

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<b>Constitution of India, Art 226—Issue of mandamus to the Taxing Officer—Reference to the Taxing Judge</b>	
A <i>mandamus</i> can be issued to the Taxing Officer under Art. 226 of the Constitution compelling him to examine the case and form an opinion as to the importance of the question and then refer to the Taxing Judge in the event of his finding that the question was one of general importance even though the Taxing Officer himself had decided the question on merits.	
<b>Court Fees Act, 1870, s 5—Jurisdiction of Taxing Officer—Opinion as to importance of the question—Mandatory duty to refer to the Taxing Judge.</b>	
The Taxing Officer while exercising his jurisdiction under s 5 of the Court Fees Act is under a mandatory duty to form an opinion as to the importance of the question when invited to do so within a reasonable time even after he had rendered his own decision on the merits of the question and then refer the same for final decision of the Taxing Judge, if the question is found to be of general importance	

—, s 5—*Question of general importance is to be decided by the Taxing Officer—High Court can quash his decision by a writ of certiorari*

It is for the Taxing Officer to decide judicially whether the question is one of general importance and the High Court can quash the decision by a writ of *certiorari* in the exercise of its jurisdiction under Art 226 of the Constitution if it were found that the duty cast on him to form an opinion was not performed judicially. The expression "When the question is in his opinion of general importance" occurring in s 5 does not leave any discretion with the Taxing Officer but imposes a duty on him to examine in each case before him whether the question was of general importance, more so, when invited to do so by the party affected

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**Criminal Procedure Code, 1898, s 145 and Oaths Act, 1969, s 3(2)—Case under s 145 of the former Act—Affidavit to be sworn before the Magistrate ceased of the case**

Affidavit in a case under s 145, Cr P C has to be sworn before the Magistrate who is ceased of the case and not before any Magistrate or any other officer not ceased of the case unless a notification is issued by the High Court or by the State Government as laid down under s 3(2) of the Oaths Act.

Fateh Singh v Badan Singh

273

**Factories Act, 1940, ss 12, 92 and r 18—Scheme for disposal of wastes submitted by Factory to Effluent Board—Factory's failure to carry out amendments suggested by the Board—Conviction under s 92—Proper**

The power granted to the Effluent Board under sub-r. 11 of r 18 authorising it to approve the arrangements which the existing factory has made with regard to its wastes and effluents also carries with it an implied power to reject the arrangement and to issue directions for the making of other specific arrangement which in the opinion of the Effluent Board would be effective

If the directions given by the Effluent Board are not complied with by the respondents they are clearly guilty of an offence punishable under s 92 of the Act

State of U. P v Kamla Prasad

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**Motor Vehicles Act, 1939, ss 47 and 57—Increase in the strength of route—Applications invited to fill up the vacancies created by increased strength—Some of the vacancies filled up—Further "road" strength increased—Applications again invited—All the applications old and new to be considered to fill up new vacancies if earlier applications remained undisposed of**

The law does not contemplate the creation of vacancies or filling up of these vacancies by specific applications for a particular vacancy. At every moment of time when applications are to be considered for grant of permit the authority has to take into consideration the existing vacancies. It is immaterial when the application had been made. The Regional Transport Authority could not grant permit without considering all the applications that were pending consideration on relevant date. *Held*, that the applications had not become infructuous or virtually disposed of after the twelve vacancies had been filled up by displaced operators and that the applications could be considered only for the two remaining vacancies out of the earlier twelve vacancies and not for the vacancies that came into existence by the raising of strength subsequently.

Hafiz Jan Mohammad v. State Transport

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**Prevention of Food Adulteration Act, 1954, s. 20—Punishment under s. 7/16 of the Act—Foodstuff found coloured with a coal-tar dye—Sanction for prosecution accorded by District Medical Officer of Health simply by putting the signature—Without applying his mind—Sanction illegal—Conviction to be set aside**

Where the sanctioning authority did not apply its mind to the case at all and its signature for sanction was a purely mechanical act, *held*, that there was no valid consent as required by law and the prosecution of the applicant was unauthorised.

Chunni Lal v. State

324

**Rules of Court, 1952 (Allahabad High Court), Chap. VIII, r. 5—Writ petition dismissed in default—Application for restoration also dismissed—The dismissal of writ petition in default is 'Judgment' hence appealable**

The order of dismissal of a writ petition is a judgment within the meaning of that word as used in the Letters Patent and r. 5 of Chap. VIII of the Rules of Court, and as such appealable. If the order is of such a nature that the rights or claims of any of the parties are finally denied, the order or decision in question would be a judgment.

Kashi Nath Dikshit v. Union of India .. ..

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**Transfer of Property Act, 1882, ss. 54 and 58(c)—Mortgage with conditional sale and sale with a condition of repurchase—Determination of real character of transaction—Prior relationship of debtor and creditor not crucial.**

The guiding principles in determining the real character of a transaction appear to be that if the words are plain and unambiguous they must be given their true real effect in the light of the attending circumstances but the phraseology employed is not always decisive. In a mortgage with conditional sale a relationship of debtor and creditor is created under the

transaction and for the debt a charge is created on the property conveyed but in a sale with an agreement to reconvey neither a relationship of debtor and creditor is created nor is price charged upon the property conveyed. The real distinction between the two transactions is the relationship of debtor and creditor the transfer being a security for the debt. The existence of a prior relationship of debtor and creditor is not crucial unless it is continued by the transaction under consideration.

—, ss 54 and 58—*Reconveyance of property within a stipulated period—Indicative of mortgage*

If the condition as to reconveyance imposes an obligation on the transferor to get the property reconveyed within a stipulated period, it is indicative of a mortgage but that would not be the case where no such obligation is cast

Jyoti Prasad Gupta v Hira Lal

300

**U. P. Consolidation of Holdings Act, 1953, s 12-C, as it stood before the amendment of the Act—Appellate order under s 12-C in partition proceedings after the coming into force of the Amending Act no 8 of 1963—Revision lies against such order under s 48 of the amended Act—Scope of sub-s (1) and (2) of s 47 of the Amending Act**

S 47(1) of the Amending Act 8 of 1963 was not applicable to a contemplated proceeding in revision to be instituted after coming into force of the Amending Act. Thus the conditions mentioned in sub-s (2) of s 47, namely that "all other work, to which the provisions of sub-s (1) do not apply" are fulfilled. A revision which may be instituted after the coming into force of the Amending Act would be governed by sub-s (2) because to such a revision the provisions of sub-s (1) were not applicable. Hence proceedings in revision under s 48 of the Act would well be within the purview of the phrase "all other work" occurring in sub-s (2) of s. 47. Such a revision would be governed by the Amended Act

*Held*, that where the Settlement Officer passed the appellate order on 19th June, 1964, after coming into force of the Amended Act, the revision filed by the appellants was maintainable and was entitled to be conducted and concluded in accordance with the Amended Act

Hari Shankar v Ram Shanker

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**U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, r 4(2)—Service of charge-sheet on the officer—Request for enquiry by Tribunal—When to be made**

When a charge-sheet is served upon a Government servant he has to make up his mind whether he would like the charges to be enquired into by the Tribunal and if so to make a request



at that stage. If once, the officer elects that the charges be enquired into by the authority under the Civil Service (Classification, Control and Appeals) Rules, the stage for his exercising the option in favour of the Tribunal is past and the officer no longer possesses the discretion to have the case referred to the Tribunal.

State of U. P. v. Ram Krishna . . . . . 401

**U. P. High Court (Abolition of Letters Patent Appeals) Ordinance, 1972** (*Ordinance no 12 of 1972*) and *U. P. Act no 33 of 1972*, ss 3 and 4—*Writ petitions filed before the commencement of Ordinance and Act—No special appeals in revenue and consolidation matters—Special appeals already pending on the date the Ordinance and Act came into force—Competent.*

Except for special appeals pending on the 17th August, 1972, all special appeals arising out of revenue suits or consolidation proceedings, whether the right to file the special appeal had become vested or not in parties, have been abolished by s. 4.

Laxmi Prasad v. Shiv Pal .. .. . 338

**U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 20(b)**—*Interpretation of the phrase "entitled to regain possession thereof" in s. 20(b)(1)—Whether the word "thereof" refers to land to which first part of s. 20(b)(1) applies or to land referred to in s. 27(1) (c) of the U. P. Tenancy (Amendment) Act, 1947.*

The word "thereof" in the second part of s. 20(b)(1) refers to that very land which falls within the purview of its first part and no *adhwasi* rights were intended to be granted either under the first part or under the second part of s. 20(b) of the Act in respect of a land held by a sub-tenant referred to in the proviso to sub-s. (3) of s. 27 of the Act of 1947.

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—, 1950, ss. 157(2) and 176—*Lessee becoming an asami—Entitled to move an application under s. 157(2).*

S. 176 and s. 178 apply to entirely different set of circumstances. They deal with a case where the suit is filed by a *bhumidhar* or *sirdar* for partition, i.e. for the separation of his own share while s. 157(2) deals with the separation of the share of the lessor at the instance of the lessee *asami* or any tenureholder. S. 157(2) contemplates only an application for separation of the lessor's share without necessitating a partition suit. The right conferred by s. 157(2) is an independent right conferred by the Legislature to meet the exigencies of special set

of circumstances and consequently the lessee who has become an *asami* under s 133(b) is entitled to make an application under sub-s (2) of s 157

Ganga Devi *v* Jiwa Ram

—, 1950, s 171 (*as amended in 1953*)—*Effective from 1st July, 1952*

With the exception of ss 37, 38 and 60 of the Amending Act all other sections thereof were directed to come into force from 1st July, 1952, that is to say, they were expressly given retrospective effect. The addition of sister's son as an heir by s 39 of the Amending Act XVI of 1953 was directed to take effect from 1st July, 1952

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Code of Criminal Procedure, 1898, s. 439— <i>Revision filed directly in the High Court—Propriety of.</i>	

The long standing practice of normally rejecting revisions filed directly in High Courts is bounded on sound and salutary principles but, will not take away the statutory power of a High Court under s. 439 of the Code of Criminal Procedure, to interfere in special cases or in cases where there has been

grave miscarriage of justice or where patent illegalities exist on the face of the record. The practice though long and fairly uniform cannot by period for which it has prevailed acquire the status of a statutory limitation on s 439 of the Code of Criminal Procedure

—, 1898, ss 242 and 537—*Omission on the part of the Magistrate to ask accused why he should not be convicted—Omission curable under s 537*

If all the material facts are stated by the Magistrate to an accused and the accused pleads that he has committed the offence, the mere omission to ask him to show cause why he should not be convicted, will at best amount to an irregularity, and if no prejudice has been occasioned, such an irregularity can be cured under s 537 of the Code of Criminal Procedure

—, 1898, s 243—*Requirements of—Mandatory—Disregard of, vitiates trial—Statements of several accused recorded as joint statement of all of them—Provisions of s 243 held violated*

The requirements of s 243 of the Code are mandatory in character and a violation of these provisions vitiates the trial and renders the conviction legally invalid

The provisions of s 243 say that the admission shall be recorded "as nearly as possible in the words used by" an accused, and this can only be possible if the statement of each individual accused is recorded separately. The recording of their statements as a joint statement of them all is doing violence to the language of the section

*Ishwar Chand v State of U P*

**Constitution of India, Arts 5, 7, 9, 10 and 11—Citizenship Act, 1955, s 9, Foreigners Act, 1946, s 9 and Foreigners (Internment) Order, 1962, para 5—Detention under—Detenue proves himself to be the Indian citizen—Detention prior to the determination of his nationality as a foreigner under section 9(2) of Citizenship Act—Legality of**

Once a person is found to be a citizen of this country under Art 5 of the Constitution of India and that citizenship is not negated by Art 7, he will be deemed to continue to be such a citizen, until he has acquired the nationality of another State. The question whether or not he has so acquired a foreign nationality is a question of fact and can be determined by the Central Government or the Prescribed Authority under section 9 of the Citizenship Act

A person cannot be arrested or detained as a foreigner under para 5 of the Foreigners (Internment) Order if he establishes, to start with, that he is a citizen of this country, and that the arrest and detention can only follow and not precede the deter-

mination of his nationality as a foreigner under section 9 of the Citizenship Act

Asfaque Husain *v* State of U P

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——, *Art 309—Financial Hand-book, Vol II, Pt II and Fundamental Rules, r 26(d)—Temporary posts held by officers of Sales Tax and Panchayat Raj Departments—Order conferring substantive capacity for certain purpose—Effect*

The substantive capacity conferred on the officers holding temporary posts in the Sales Tax Department as well as in the Panchayat Raj Department was for a specific purpose i.e. counting leave for increment purpose, and for no other purpose. That order did not convert the appointments of the temporary government servants in those departments either into permanent appointments or into temporary appointments. It is substantive capacity in permanent posts.

——, *Art, 309—Rules framed thereunder—Temporary appointed government servant holding a permanent post—Not a permanent government servant*

A temporary government servant does not become a permanent government servant unless he gets that capacity either under some rule or he is declared or appointed by the government as a permanent government servant. There was no rule under which respondent could be considered as having been appointed either permanently or in a substantive capacity to permanent posts. All along they continued to be temporary government servants whether posts held by them were temporary posts or permanent posts.

Director Panchayat Raj and State of U P *v* Babu Singh Gaur, Jugal Kishore Bhatt and Moradhwaj Chauhan

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**Hindu Marriage Act, 1955, s 24—Question of jurisdiction raised—Expense to the needy spouse—Can be allowed—Court's discretion**

Even where a question of jurisdiction has been raised the court has, before deciding that question, power to grant relief under s 24 of the Hindu Marriage Act provided that, on the averments made in the petition, the petition is maintainable and the court, *prima facie*, has jurisdiction to entertain it. Though the court has this power, it has discretion under s 24 to postpone the consideration of relief under s 24 till the question of jurisdiction is decided. It would, however, be desirable to allow expenses to the needy spouse to fight out the issue of jurisdiction also, even where the court thinks that the question of *pendente lite* maintenance should be decided after the issue of jurisdiction has been decided.

—, 1955, s 24 and Code of Civil Procedure, 1908, s 115—  
Revision arising out of proceedings under the former Act—  
It is a proceeding under the Hindu Marriage Act—Court's  
jurisdiction to allow expense of revision

Relief under s. 24 of the Hindu Marriage Act can be granted in a revision against an order passed in a proceeding under the Act. The words "in any proceeding under this Act" have been used in a wider sense to include all proceedings arising out of orders passed in petition filed under the Hindu Marriage Act. Relief can be granted on an application under s 24 even in a revision filed under s 115, C. P. C.

Surendra Kumar Asthana v Smt Kamlesh Asthana

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**Indian Arbitrator Act, 1940.**—*Proceedings before Arbitrator—  
Technical rules of evidence, procedure and pleadings—  
Applicability of—Ex parte proceedings—Request for adjournment—Refusal of—Grounds for*

An Arbitrator is not bound by the technical rules of evidence, procedure and pleadings. He has however, to abide by the fundamental principles of natural justice and must act in a manner that will subserve the interest of justice. It is the duty of the Arbitrator to inform a party that he intends to proceed with the reference at a specified time and place. If such a notice is issued and a party fails to appear, the Arbitrator would be at liberty to proceed *ex parte* against him.

The granting of an adjournment to a party is within the discretion of an Arbitrator. The discretion should, however, be exercised in a reasonable manner upon proper material and after considering a party's conduct in the case. The Arbitrator should consider whether the party concerned had shown a sufficient cause for adjournment. What is sufficient cause will depend upon the facts and circumstances of each case. Dilatory conduct of a party to the case and want of due diligence on his part may in a particular case be not sufficient cause for adjournment.

Lachman D Chablani v Union of India, New Delhi

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**Indian Medicine Act, 1939, s 39(4).**—*Ayurveda graduates registered as medical practitioners—Authorised to do medico-legal work—The order prohibiting them is bad*

When the Indian Medicine Act expressly entitles practitioners registered under the Indian Medicine Act, to do medico-legal work and to appear as an expert, the State Government has no power to contravene that provision. The impugned order passed by the Civil Surgeon, Saharanpur, is clearly violative of the provisions contained in s 39(4) of the Act.

State of U. P v Atma Ram Chauhan

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**Indian Penal Code, 1860, s 188 and Code of Criminal procedure 1898, s 144.**—*Mere disobedience of order passed under s. 144 do not amount to an offence under s 188*

Ishwar Chand v. State of U P

**Indian Stamp Act, 1899, s 2(16)(c) and Art 35(b) of Sch 1 B of U P Stamp (Second Amendment) Act 1958**

The bid-sheet as such cannot be treated as lease of the tolls, as no concluded enforceable contract between the parties emerged by mere signing the bid-sheet. It cannot also be treated as an agreement to let out the tolls, inasmuch as it does not evidence any such enforceable contract. There is no attestation of this document by a witness. It would as such not answer the description of a "bond". It also does not appear that it is "an instrument" as defined in s. 2(14) of the Act. It is also not "a conveyance" for no movable or immovable property has been transferred by the bid-sheet. The document as such is not chargeable to duty under the Act.

Trilok Chand v Chief Controlling Revenue

Authority (F B)

Rule of Practice—*Deviation from*

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A rule of practice is a rule of guidance and not a rule of law and the High Court can deviate from the rule of practice in order to subserve the ends of justice.

Ishwar Chand v State of U P

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**Specific Relief Act, 1963, s 6(3), (1) and Code of Civil Procedure, 1908, s 47—Appeal—Decree passed under s 6—Execution of—Objection against—No appeal lay against the order passed under s 47—Remedy by way of regular suit if open**

In view of the provisions contained in sub-s (3) of s 6 of the Specific Relief Act 1963, no appeal shall lie from an order or decree passed in suit instituted under that section either on the regular side or on the execution side.

A regular suit to challenge the order passed under s 47, C P C in execution of the decree passed under s. 6 of the Specific Relief Act would not be barred. To that extent the provisions of the general law contained in s 47(1) shall be deemed to have been overridden by special law, contained in sub-s (4) of s 6 of the Specific Relief Act.

Code of Civil Procedure, 1908 s 47—*Words and Phrases—*  
"Not by a separate suit"—*Meaning of—Specific Relief Act, 1963, s 6(4)*

The words "not by a separate suit" refer to a suit of the nature in which the decree under execution itself has been passed. They do not refer to a suit of a different nature which is permitted by sub-s (4) of s 6 of the Specific Relief Act.

Jamaluddin v Asimullah

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**U. P. Sales Tax Act, 1948, s. 4(a) and Central Sales Tax Act, s 8(2-A)—Notification dated 16th February, 1965—Condensed milk not taxable under the Central Sales Tax Act.**



Turnover of the sale of condensed milk is completely exempt under s 4(a) of the U P, Sales Tax Act from payment of sales tax and as such the dealer is not liable to pay Central Sales Tax with regard to it as provided under s 8 of the Central Sales Tax Act,

*Indogan Products Ltd. v. Commissioner of Sales Tax (F B.) . .*

**U. P. (Temporary) Control of Rent and Eviction Act, 1947.**  
*Direction given by Commissioner in 1946 for presentation of revisions to the Additional District Magistrate (Judicial)—Such presentation valid.*

Since the Rent Control Act did not, either by itself or rules framed thereunder, lay down the precise procedure in regard to the presentation of revision, the Commissioner who was the authority entitled to entertain and decide the revisions was within his right to prescribe the procedure in respect of the presentation of revisions. The direction given by the Commissioner in 1946 with regard to the presentation of revisions was valid and enforceable.

Though the Commissioner had no jurisdiction to hear and decide the revisions under the Rent Control Act in 1946, the Commissioner could lay down its practice and procedure and such procedure also governed subsequent jurisdiction conferred upon him. If the Commissioner had indicated the manner and place of presentation of the revisions to it, that procedure would equally apply to the revisional jurisdiction conferred upon the Commissioner afterwards.

*F C Pasricha v State of U P*

**U. P. Tenancy (Amendment) Act, 1947, s 27(3) proviso—**  
*Person declared to be sub-tenant—Holds the land from year to year*

*(Per majority—HARI SWARUP, J contra)* A person declared to be sub-tenant under the proviso to sub s (3) of s 27 of the U P Tenancy (Amendment) Act, 1947, holds the land from year to year.

**U P Zamindari Abolition and Land Reforms Rules, 1952.**  
*App III, sl No 25(1)—Amendments to sl no 25(1) by notification dated 20th November, 1954—Effect—Vested rights—Not defeated*

The amendments introduced to sl no 25(1) of the third Appendix to the Zamindari Abolition Rules by the notification dated 20th November, 1954, are not retrospective in operation so as to defeat vested rights.

*Prem Singh alias Preme v Hukum Singh (F B)*

**U. P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972, s 43(2)(rr) and Constitution of India,**  
*Art 14—Permission under s 3 of U P Act no 3 of 1947 to file a suit for eviction of tenant—Application under s.*

21 of New Act 13 of 1972—*Ejection without payment of compensation—Provisions not discriminatory*

In enacting s 43(2)(rr) the intention of Legislature appears to be that where permission has been obtained under s. 3 of the old Act on any ground specified in sub-s (1) or sub-s (2) of s 21 and has become final and suit for eviction of tenant has not been instituted, the landlord should be allowed to avail of the simple procedure prescribed under the new Act for eviction of the tenant unfettered by any condition and without being called upon to pay any compensation to the tenant. Persons falling under s 43(2)(rr) who have obtained permission for eviction under the old Act, could legitimately be classified as separate group distinct from those who obtained an order for eviction of the tenant under s 21 of the 1972 Act. No distinction has been made in the impugned provision between persons falling in the same class

Sital Das v. State of U P

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**Agra University Act, 1926, s 25-C(2) and Statute 30, Chap XVIII and Kanpur and Meerut Universities Act (U P Act No XIII of 1965), s 28(3)—Services of teacher and principal of affiliated colleges—Not purely contractual but controlled by the above Act and Statutes**

The services of a teacher including the Principal of the affiliated colleges is not purely contractual and is regulated and controlled by the provisions of Meerut Act and Statutes

The management of an affiliated college of the Meerut University is a statutory body or a statutory functionary while discharging its functions under the Act and the Statutes within the meaning of the third exception formulated by the Supreme Court in *S R Tiwari's case*

**Aligarh Muslim University Act, 1921, s 31, Statute 3(2)—Breach of Regulations by any Authority of University—Decision invalid and to be set aside**

The Regulations are meant to be observed and followed and then breach by any Authority of the University in taking a decision will make that decision invalid in the same way as a decision made in breach of the provisions of the Act, the Statutes and the Ordinances

The Regulations have the same force as the provisions of the Act, the Statutes and the Ordinances of the Aligarh Muslim University

Vaish College (Society), Shamli *v* Lakshmi Naram  
(F B) . . . . . 583



**Industrial Disputes Act, 1947, s 2-A—Individual dispute relating to workman—Industrial dispute—S 2-A—Validity of**

Conferment of legislative power with respect of industrial disputes included the power to legislate on individual disputes S 2-A was within the legislative competence of Parliament

Har Naram Ashok Kumar *v* State of U P ,  
**Kanpur and Meerut Universities Act, 1965—Management of College—Termination of teacher's services—Acts as a statutory body**

*Held*, that the management of two colleges concerned acts as statutory body or statutory functionary when it takes action to terminate the services of a teacher

—, 1965—*Termination of service of teacher by Management of College—Violation of statutory requirements—Entitled to an injunction or a declaration from Civil Court*

*Held*, that the teacher will be entitled to an appropriate injunction and a declaration from a Civil Court that the action taken against him in terminating his services by the management was in violation of the statutory provision of Meerut University Act and Statutes and that he was entitled to be re-instated in service

Vaish College (Society), Shamli *v* Lakshmi Narain (F. B)

**Mohammedan Law—Mutwalli in good health—Appointment of his successor to be effective after his death—Validity of**

Appointment of a successor by a *mutwalli* in good health which would be effective after the death of the *mutwalli* does fall within the permissible limits of the Mohammedan Law *Held*, that the nomination of a successor by a *mutwalli* can be made even in good health, to take effect on death

By nomination a *mutwalli* only proposes or selects his successor to exercise his duties as *mutwalli* on his death He does not part with or delegate his functions as *mutwalli* during his lifetime It is only this delegation or parting with duties by *mutwalli* during his lifetime in good health that is prohibited

Syed Hashim Husain *v* Sheikh Ahmad Raza

**Rural Development (Requisitioning of Land) Act, 1948, s. 2(2)(iv)—Requisition of land for instructional farms—Covered by public purpose—Valid**

Instructional farms for the purpose of development of agriculture would be covered by the definition of public purpose, and consequently requisition of the land for the establishment of demonstrational and instructional agricultural farm for the purpose of the village agricultural school would be requisitioned for a public purpose The requisition of land for agricultural farm will, therefore, be valid

—, s 2(2)(b)—*Agriculture will not include pisciculture—The meaning of the agriculture used in the Act cannot include within its ambit the term pisciculture*

The definition of the land including tank does not speak about the purpose the tank has to be utilised, and hence the definition of the land as including tank cannot lead to the conclusion that agriculture includes pisciculture

Gaon Sabha, Bhagwanpur v Tahsildar and Assistant Collector, Roorkee

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**U. P. Zamindari Abolition and Land Reforms Act, 1950, ss 2(1)(c), 1(3) and 117-A and U. P. Zamindari Abolition Rules, 1952, r 115-C—Act inapplicable to land covered by s 2(1)(c), in the absence of notification under s 1(3)—State Government cannot vest it in Municipal Board—R 115-C inapplicable to such land**

If the land is covered by the provisions of cl (c) of sub-s (1) of s. 2 of the Act the Act will not apply to such land in the absence of a notification under s 1(3) of the Act. Such land will not vest in the State Government and the latter will have no power to vest it in the Municipal Board under s 117-A of the Act. For the same reason r 115-C of the U. P. Zamindari Abolition and Land Reforms Rules will also not apply to such land

*Held*, that the notification under s. 117-A of the Act and the order of the Tahsildar issued under r 115-C of the U. P. Zamindari Abolition Rules were invalid

Municipal Board, Ghaziabad v Jai Prakash

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An offence under s 25 of the Arms Act will be non-bailable if it is in relation to a fire arm but if it is in relation to any arm, other than fire arm, the offence would be bailable. As such private person had no right to apprehend the accused. Sec 20 of the Arms Act is inapplicable to the facts of the case.

*Abdul Habib v State*

**Code of Civil Procedure, 1908, O XXI, r 103 and Limitation Act, 1963, Art 98—Suit under O 21, r 103 filed within one year from final order of High Court in revision—Suit with in limitation**

Where a revision application against an order passed by the execution court on 24th October, 1964 had been admitted and was finally decided after hearing both the parties on 3rd May, 1967 held, that the period of limitation for a suit under O. 21 r 103, C P C, must be deemed to have started running from the date the revision application was decided and a suit filed within one year as provided by Art 98 of the Limitation Act would be within time.

*Gopal Lal v Ram, Karan Singh*

—, 1908, O 33 and O 11, r 12—*Proceedings for pauperism—Discovery of documents—Can be ordered*

The provisions of r 12 of O 11 relating to discovery of documents apply to proceedings under O 33.

There is no reason to hold, if costs could be saved, that it is not salutary to resort to the procedure of discovery of documents in proceedings under O. 33.

—, 1908, O 11, r 21—*Order for discovery of documents—Opposite-party bound to make an affidavit of documents—Production of documents for inspection*

When the court makes an order for discovery under the rule, the opposite-party is bound to make an affidavit of documents and on his failure, he will be subject to the penalties specified in r 21 of O 11.

After he has disclosed the documents by the affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant.

—, 1908, O 11, r 12—*Document relevant though inadmissible in evidence—Discovery to be ordered*

The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings; though it might not be admissible in evidence.

—, 1908, s 115—*Discovery of documents—Jurisdiction—Order not vitiated by error of law*

*Held*, that the trial court had jurisdiction to pass the order for discovery *Held* that such an order is not vitiated by any error of law

M L Sethi v R P Kapur

709

**Code of Criminal Procedure, 1898, s 59—Arrest by private person—Words “In view of”—Meaning of—Arrest by person in whose presence offence was not committed—Right of**

A private individual may arrest a person only when (1) he is a proclaimed offender, or (2) he, in his view, commits a non bailable and cognizable offence. The essential thing is that the offence must be committed in his view. The words “in his view” mean “in presence of” or “within sight of” and not “in his opinion” or on his suspicion or on receipt of information.

The right to arrest accrues not on the basis of opinion, suspicion or information but on the basis of his visual knowledge, that is to say, on the basis of his own personal knowledge derived from the use of his own eyes in seeing the crime being committed.

Abdul Habib v State

769

**Constitution of India, Art 226 and Civil Procedure Code, 1908, s 115—Revision dismissed by the High Court—Order impugned in the revision merges in the order of the High Court in revision—Writ petition against the order impugned in the revision incompetent**

Where a revision is dismissed on the finding that no question of jurisdiction arose so as to attract the provisions of s 115, C P C, the dismissal of revision would be treated as on merits. The finding that the case was not brought within any of the clauses of s 115, C P C is a finding on merits. The principle of merger would apply to a decision given in the revisional jurisdiction and the same order which has been challenged in the revision cannot be challenged in a writ petition and the writ petition would not be competent.

Kanti Saran v L Babu Ram

811

—, Art 226—*Natural justice—Notice of resumption issued without opportunity to represent the case—Order no 241*

Even if there is no provision of any opportunity of being heard in standing order no 241 the principles of natural justice are attracted for proving the market value of the property. Order no 241 shows that the valuation has to be substantiated in a court of law and so it has to be supported by accurate details and the petitioner has to be heard.

## Bhagwati Devi v President of India

——, Art 348—*Authoritative text—Bills, Acts or Ordinances passed in language other than English—When authoritative—Exclusive competence of Parliament—Authorised translation into English of the Act originally passed in Hindi language—English translation shall be regarded to be its authoritative text—U P Consolidation of Holdings Act.*

Whenever a question arises as to what is the authoritative text of a particular Act or an Ordinance etc of a State Legislature one has to turn to its English translation if it was enacted in a language other than the English language. The authoritative text of Bill, Act or Ordinance of a State Legislature cannot be in a language other than the English language unless the Parliament by law otherwise provides.

The power to declare that the authoritative text of any Ordinance, Act etc, of a State Legislature shall be in a language other than the English language has been vested exclusively in the Parliament. The Parliament has not made any such provision so far. It is beyond the competence of a State Legislature to provide that the authoritative text of its Acts and Ordinances etc shall be in a language other than the English language. The official language of the State of Uttar Pradesh is Hindi, so that the Legislature of this State can pass Ordinance, Acts etc in Hindi language. Thus even though the U P Consolidation of Holdings Act was passed by the State Legislature in Hindi, yet its translation in the English language shall be regarded its authoritative text and shall prevail over its Hindi version.

——, Art 348(3)—*Scope of—Words “Notwithstanding anything in sub-cl (b) of cl (1)” —Meaning of—State Legislature prescribing language other than English for use in Bill and Acts etc—Authorised text of—Conflict between—English version shall prevail—U. P. Language (Bills or Acts) Act, 1950 and U P Official Language Act 1951*

The words “notwithstanding anything in sub-cl (b) of cl (1)” occurring in cl (3) of Art 348 only means that a State Legislature may prescribe any language other than the English language for use in Bills introduced in or Acts passed by the State Legislature and that cl (1)(b) shall not create an impediment in its way. When a Bill is introduced or an Act is passed in a language other than the English language by a State Legislature, an authoritative translation thereof in the English language has to be provided and that translation shall for the purposes of cl (1)(b) be deemed to be the authoritative text thereof.

When there is conflict between the English version of a Statute of a State Legislature and its version in a local language, the version in English language will prevail over the version in the local language.

Smt. Ram Rati v. Gram Samaj, Jehwa (F. B.) . .

**Guardian and Wards Act, 1890, ss 7, 26 and 39(h)**—*Person residing out of India—Application for appointment of guardian—Object to take the minor outside India permanently.*

The courts do not appoint guardians only to let the child secure a passport or for getting charitable education or help. The purpose of appointment of a guardian by a court under the Guardians and Wards Act is to protect the child and not to grant a licence for taking the child out of the country.

*Held*, that it would not be sound policy to appoint a foreigner as a guardian over whom the court may have no control.

Trives Holst Thomsen v Children's National Institute . . . . .

755

**Hindu Marriage Act, 1958, ss 11 and 19**—*Suit by previous wife—Declaration of second marriage of her husband, as void—Suit maintainable—No petition at her instance will lie under the Act.*

A petition under s 11 of the above Act is maintainable only at the instance of one of the parties to the marriage which is sought to be declared null and void. A petition by a person who is not a party to the marriage sought to be declared null and void, will not lie under s 11.

*Held*, that a suit filed by the previous wife for declaration that the second marriage of her husband was null and void is not barred by s 19 of the above Act.

Jokhan Prasad Shukla v. Lakshmi Devi . . . . .

853

**Indian Limitation Act, 1908, ss 19 and 20**—*"Prescribed period" in s 20—Meaning—Whether payment of interest extends the period of limitation.*

The use of the expression "prescribed period" will mean not the period prescribed for the repayment of loan but the period prescribed for limitation of the suit and if the period means the prescribed period for the limitation of the suit, Sch I has to be read with s 12 of the Limitation Act and the day from which such period is to be reckoned has to be excluded. The payment of interest within the period of limitation extends the period of limitation and there is no reason why a different interpretation should be put for the "prescribed period" in the case of an acknowledgment or payment of interest than in a case of suit.

Salek Chand v Abdul Azaq . . . . .

784

**Indian Penal Code, 1860, s 100 (sixthly)**—*Right of private defence to cause death—Clause (sixthly)—Applicability of—Necessary facts to be proved.*

For the applicability of s 100 (sixthly), there must be proof of the following facts, namely

- (i) There must be an assault,
- (ii) That assault must be with the intention of wrongful confinement,
- (iii) Such an assault must be made under the circumstances which may reasonably cause a person to apprehend that he will be unable to have recourse to the public authorities for his release,
- (iv) All the three must co-exist, and
- (v) Even if all these four exist, the act must fall under the restrictions mentioned in s 99

Abdul Habib *v* State

769

**Intermediate Education Act, 1921, s 16-G(3)—Service of teacher—Termination of—Approval of District Inspector of Schools cannot be granted subsequent to the termination**

S. 16-G (3)(a) contains a prohibition against the discharge, removal or dismissal from service of a Principal, Head Master or a teacher except with prior approval in writing of the Inspector. The approval cannot be granted subsequently

Bansidhar Sharma *v* Deputy Director, Education  
**Interpretation of Statute—Rule of harmonious construction.**

739

The well-known rule of interpretation of statutes is that a particular provision of a statute should be so interpreted as to harmonise with the other provisions of the same statute and not in a way that it may render superfluous or nugatory to another provision of the statute

Gram Sabha, Kudra *v* Noor Mohd Khan

847

**Resumption of property in Cantonment—Governor General's order no 179 of 1836, cl 6—Interpretation and conditions upon which the power can be exercised**

Cl. 6 of the Governor General's order no 176 of 1836 confers power upon the Government to resume the grant. The grantee's interest can come to an end only after he had been given one month's notice and paid the value of the authorised building. The Government does not acquire the right to take possession of the land on the expiry of one month's notice. The paying of the value of the building is as much a condition as is the giving of one month's notice before the power to resume can be effectively exercised

Bhagwati Devi *v* President of India

841

**U. P. Agricultural Income Tax Act, 1948, ss 5 and 6(2)(b)—Agricultural Income-tax—Computation of—Loss incurred under s. 6 (2) (b), should be set-off against income under s. 5,**

In computing the total agricultural income-tax of the assessee the loss, which he had incurred under section 6(2)(b) should be set-off against his income under s. 5.

Raja Vijay Kumar v. State

806

**U. P. Consolidation of Holdings Act, 1953, s. 5(1)(c)(ii)—**  
*Words "any part"—Meaning of—Transfer of whole holding—No permission is necessary.*

Having regard to the terminology employed in the preceding clause and the succeeding proviso, no other meaning can be assigned to the expression "any part" occurring in s. 5(1)(c)(ii) of the Act except that it means "a part" as distinguished from "the whole." So it is not necessary to obtain the permission of the Settlement Officer (Consolidation) for the transfer of the holding as a whole

Smt Ram Rati v Gram Samaj, Jehwa (F B)

857

—, 1953, ss 9, 11-A and 48—*Revision—Scope of—Right of title of Gaon Sabha—No objection under s. 9—Right if can be inquired into at the revisional stage—Bar of s. 11-A*

*Held*, because the Gaon Sabha had not filed an objection under s. 9 within limitation it was barred by s. 11-A from raising an objection respecting such claim or from being heard respecting such claim at any subsequent stage of the consolidation proceedings and that being so, the Deputy Director of Consolidation could not in exercise of his *suo motu* powers under s. 48 enquire into the right or title of the Gaon Sabha which was not a party to any consolidation proceeding before the subordinate authorities. The scope of power conferred by s. 48 on the Deputy Director of Consolidation to adjudicate upon the regularity, correctness or legality of an order passed by a subordinate consolidation authority must remain confined to matters between the parties before the consolidation authorities and this power cannot extend to persons who are not parties to the consolidation proceedings at any stage or to complete strangers or outsiders to these proceedings

Gram Sabha, Kudia v Noor Mohd Khan

817

—, 1953, s. 48—*Second appeal filed in 1967 after the coming into force of the Amending Act No. 8 of 1963—Deputy Director can convert it into a revision and decide it as such*

When the second appeal had been transferred to the Deputy Director, he had full seisin of the case, if on finding that the memorandum was wrongly described as a second appeal and was entertainable validly in law as a revision, he had the requisite jurisdiction and power to effect the conversion of the second appeal into a revision

In such circumstances, it is in the interest of justice fit and proper to convert the appeal into a revision and to hear it and decide it as such

Murlidhar Agarwal v Dy Director, Consolidation,  
 U. P.

803

9 HC(ILR)—1972—(11)

—, 1953, s 49—*Suits for declaration or adjudication of rights of persons governed by U. P. Tenancy Act—Not barred*

Consolidation authorities have not been empowered to adjudicate rights of persons who are not tenure-holders as defined by the Act. In relation to rights in land, the bar created by s 49 can extend to suits which relate to declaration or adjudication of rights of tenure-holders, such as *bhumidhar*, *sindar* or *asami*. It does not bar suits relating to declaration or adjudication of rights governed by the U. P. Tenancy Act.

*Held*, that as the land in dispute was governed by the U. P. Tenancy Act, U P Consolidation of Holdings Act was not applicable to it and the authorities under the U. P. Consolidation of Holdings Act had no jurisdiction to adjudicate the rights to such land and their findings were void as being without jurisdiction.

Deo Narain v Board of Revenue

723

**U. P. Co-operative Societies Act, 1965, s 131(3)(4) and U P Co-operative Societies Rules—Bye-laws—Amendment to bring them in conformity with the provisions of the Act and Rules—Period of one year prescribed is merely directory—Amendment made after that period—Validity of**

The period of one year mentioned in sub-s (3) of s 131 of the Act is directory and not mandatory. If a co-operative society fails to amend its bye-laws within one year as required by sub-s (3) the Registrar may make the necessary amendments. If before the Registrar actually takes any action under sub-s (4) the Co-operative Society itself amends its bye-laws so as to bring them in conformity with the provisions of the Act and the Rules, even though it is done after the expiry of one year, the amendment would not be invalid for that reason.

**U. P. General Clauses Act, 1904, ss 6 and 24, U P Co-operative Society Rules, ss 416 and 418—Rule amended with effect from 5th December 1969—Amended rules being inconsistent with the existing bye laws—Effect of**

*Held*, bye-laws cannot override the provisions of the rules of the Act as amended from time to time. The provisions contained in ss 6 and 24 of the General Clauses Act cannot be invoked to support the contention that the bye-laws containing provisions about the functioning of an election—Sub Committee will continue to be valid even after 5th December, 1969.

Uma Shanker Misra v Zila Sahkari Federation Ltd.

788

—, 1904, s 6—*U P Temporary Control of Rent and Eviction Act came to an end—New Act came into force—Whether s 6 of the Act applicable.*

In the case of a temporary statute the provisions of s 6 of the General Clauses Act are not applicable as this section does not deal with the repeal to temporary statutes, and deals only with permanent statutes

S 6 of U P General Clauses Act cannot have the effect of extending the life of a temporary Act beyond the period stated in the temporary Act itself. As a result s 6 of the U P General Clauses Act would be effective only to the original date of its expiry. Hence the only result will be that up to the original date of its expiry rights and liabilities accrued and incurred under the temporary Act before the repeal would be continued to be enforced and proceedings in regard to them would be permitted to be taken in spite of the repeal. It is only to this limited extent that s 6 of the U P General Clauses Act would be applicable

Raja Ram Jaiswal *v* Kusum Kumari

814

**U P. Tenancy Act, (1939), ss 29 and 30(3)—Land acquired for trenching and sanitation—Leased out for 15 years—No accrual of hereditary rights in such land**

Cl (3) of s 30 of the U P Tenancy Act provides that hereditary rights shall not accrue in land acquired or held for a public purpose. If the land was acquired under the Land Acquisition Act it was acquired for a public purpose and fell within the purview of cl (3). It is to be noted that the phrase "acquired or held" shows that it is not necessary that the land which was acquired for a public purpose must continue to be held for that purpose. In such land hereditary rights could not accrue.

Nagar Mahapalika, Allahabad *v* Amar Pal Singh

719

— 1939, s 180—*Effect of Amending Act 10 of 1947—Ambit of s 180 widened—Suit maintainable under s 180 after the amendment in 1947 even if the land in dispute may be of a nature that hereditary rights cannot accrue in it.*

After the addition of the proviso to sub s (2) a suit under s 180 would be maintainable even if the consequence mentioned in sub s (2) did not accrue in cases where the proviso becomes applicable.

After the amendment of 1947 the only condition precedent to the maintainability of a suit under s 180 is that the plaintiff should be entitled to admit the defendant to occupy the plot. So even if prior to 1947 a suit under s 180 may not have been maintainable in relation to grove land such a suit was competent after the amendment.

Deo Narain *v* Board of Revenue

723



**U. P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972, s 43(2) (s) and U P. (Temporary) Control of Rent and Eviction Act, 1947, s 3(1)**

*Suit for eviction and realisation of rent under the 1947 Act—Dismissed by Courts below—Second appeal pending—Commencement of 1972 Act—Appeal to be decided according to 1947 Act*

Saving clause contained in s 43(2) (s) is meant only for limited purpose, the purpose being that in case a suit on one of the grounds mentioned in s 3(1) of the old Act is pending either in original court or in appeal, the same would be permitted to continue as if new Act has not been enforced

Apart from this, there are savings which have been provided for in s 43(2) of the new Act. Those savings contained in other provisions of the aforesaid section, appear to have been made applicable only to those buildings or premises which are governed by the provisions of the new Act, and not otherwise

Raja Ram Jaiswal v Kusum Kumari

**U. P. Zamindari Abolition and Land Reforms Act, 1950 s 229-C and 234-A—Recorded occupant in 1956 &—Becomes *adhwasi* under s 20(b)(i) and *sirdar* from 30th October, 1954—Suit for declaration of *sirdar* not maintainable**

S 229 C read with s 234-A provides for a suit for a declaration of a person claiming to be an *adhwasi*. Evidently such a suit was maintainable only so long as a person could, in law, claim to be an *adhwasi*. With effect from 30th October, 1954, when Chap IX was added to the Zamindari Abolition and Land Reforms Act, *adhwasi* becomes *sirdar* and the erstwhile *bhumidhars* lost their interests. With effect from that date the respondents, who were till then claiming to be *adhwasis* could no longer be termed as persons claiming to be *adhwasis* within the meaning of s 229-C and so a suit for declaration of rights of a person claiming to be *sirdar* could not validly be instituted after 30th October, 1954 and no declaration of right as an *adhwasi* could effectively be made in 1960

1950 s 229-C—Suit for declaration of *sirdar*—Government and Gaon Sabha not impleaded—Effect of compromise in such a suit—Compromise decree is nullity—No estoppel

If the Statute requires that the declaration of rights of *sirdar* can take place only in the presence of the State Government and Gaon Sabha, then, an agreement in the absence of these parties would be violative of such a statutory provision. No plea of estoppel can be based on a transaction which violates a mandatory statutory provision

Surendra Narain Dubey v Deputy Director, Consolidation

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## APPELLATE CRIMINAL

Before Mr Justice D S Mathur and  
Mr Justice H I. Capoor

STATE

APPELLANT,

v

MAHENDRA

RESPONDENT

U. P. Excise Act, 1910, ss 7 and 71—*Possession of intoxicant without licence or permit—Licensee and person actually in possession can be prosecuted* 1979  
December,  
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S 71 of the Act makes it clear that for possession of an intoxicant without any licence or permit not only can the licensee be prosecuted but also the actual offender, that is the person actually in possession thereof

Government Appeal No 1204 of 1969 against the order of M P Saxena, Sessions Judge, Kanpur, in Criminal Appeal No 11 of 1969 decided on 14th March, 1969

G I, for the Appellant

I K Berman, for the Respondent

D. S. MATHUR, J — This is an appeal against the order dated 11th March, 1969 of the Sessions Judge of Kanpur allowing the appeal of Mahendra, respondent, and acquitting him of the offence punishable under s 60 of the U P Excise Act. The respondent was charged for being in possession of 1,600 grams of contraband Ganja and 2½ Tolas of Charas

On the 26th of December, 1967 the Additional District Magistrate (City) paid a surprise visit to the country liquor shop in village Pura Bazar, police station Sheorajpur, district Kanpur, in which the respondent was working as salesman and found the above quantity of Ganja and Charas in the shop. The recovered articles were examined by the Excise Inspector whereafter the respondent was prosecuted,

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The question put to the respondent was whether the above Ganja and Chaias were recovered on a personal search being taken and he replied in the affirmative. He adhered to the admission even when it was brought to his notice that he could be convicted on its basis. The Magistrate thereupon convicted the respondent under s 60(a) of the U P Excise Act and sentenced him to a fine of Rs 400, in default, three months' R I.

Mahendra preferred an appeal before the Sessions Judge raising many points. In none it was said that the recovery was from the shop and not on his personal search. The learned Sessions Judge, however, allowed the appeal being under the impression that s. 7 of the U P Excise Act granted immunity to a servant found in possession of an intoxicant on account of his master, and also because it was not put to him that he was in possession of the intoxicant on his own account, such facts could not be assumed nor could be used against him.

The attention of the learned Sessions Judge does not appear to have been drawn to s 71 of the U P Excise Act. The material part thereof is as below.

and the holder of a licence, permit or pass under this Act shall be liable to punishment, as well as the actual offender, for any offence punishable under s 60, s 62, s 63 or s. 64 committed by any person in his employ and acting on his behalf as if he had himself committed the same, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence.

Provided that no person other than the actual offender shall be punished with imprisonment except in default of payment of fine."

S 71 makes it clear that for possession of an intoxicant without any licence or permit not only can the licensee be prosecuted but also the actual offender, that is the person actually in possession thereof

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All the provisions of an enactment must be read together. It cannot be assumed that any provision of the enactment is a surplusage or need not be given effect to. When the matter is considered in this light s 7 cannot grant immunity to the actual offender. By virtue of s 7 the employer of a clerk or servant or husband can be deemed to be in possession and can be prosecuted for being in possession of an intoxicant provided that the prosecution proves that the possession of such person is on behalf of the master or husband. When s 7 permits the prosecution of the master or husband also it cannot by any stretch of imagination be said that by virtue of this provision the actual offender cannot be prosecuted for the same offence. The matter has been clarified in s 71 in respect of the holder of a licence, permit or pass.

It shall, however, have to be kept in mind that the master or husband can be deemed to be in possession only if it is proved that the actual possession was on behalf of the master or husband. However, in the case of a licensee the burden will lie upon him to show that he had taken all reasonable precautions to prevent the commission of an offence. Consequently, if the salesman commits an offence on his own account but not on account of the licensee the latter shall still be liable for prosecution if he is not able to establish that he had taken due and reasonable precautions to prevent the commission on an offence.

In the instant case only the salesman, and not the licensee, was prosecuted which was permissible. It is a different thing that the salesman be not liable to

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conviction for the reason that he was not aware of the existence of the intoxicant in the shop. In case the recovery was made on personal search being taken this question shall not arise.

The order of the learned Sessions Judge thus deserves to be set aside. In view of the admission made by the respondent none of the documents were proved and exhibited. As there is a possibility of a mistake having crept in the question as put to the respondent the proper thing shall be to set aside the order of the Magistrate also, so that there may be proper trial.

The request for not ordering a fresh trial is not being accepted as the offence is of a serious nature. The offence is alleged to have been committed not by an ordinary citizen but by the salesman of a dealer duly licensed to sell country liquor. The checking of country liquor shops lying in Mufassil areas is done occasionally and if the licensee or the salesman appears to have committed some offence their case must be dealt with severely.

The Government appeal is hereby allowed and the orders of both the learned Sessions Judge and of the trying Magistrate are set aside. The Magistrate shall now re-try the accused after perusing the necessary documents and putting all the material questions to the respondent for his reply and explanation. The record shall be returned without any delay. As retrial shall take place, the amount of fine shall be refunded, if applied for, to the respondent himself.

*Government appeal allowed*

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## APPELLATE CIVIL

*Before Mr Justice D S Mathur and*

*Mr Justice Omprakash Trivedi\**

ASHIQ KHAN

.. PETITIONER,

1978

January, 24

v

ASSISTANT CUSTODIAN GENERAL,

EVACUEE PROPERTY AND OTHERS RESPONDENTS

**Administration of Evacuee Property Act 1950, s 8(1) (b) and U P Ordinance No 1 of 1949, s 2 (c)(i)(ii)—Evacuee—Meaning of—Person migrated to Pakistan after 15th August 1947 and was residing there—S 8 (1)(b) if, can be utilised for ascertaining the meaning of expression “Evacuee”**

A person who had migrated to Pakistan after 15th of August, 1947 and was residing in Pakistan was also covered by cl (ii) of s 2(c) of U P Ordinance No. 1 of 1949. The provision was, however, not applicable if after migration the person settled down in country other than Pakistan. S 8 (1)(b) of the Act cannot restrict the scope and meaning of the expression “evacuee” or “evacuee property”. Any new provision in a subsequent enactment cannot be utilised to restrict the general scope of the provisions in the earlier enactment.

**Central Ordinance No XII of 1949 and XX of 1949, ss 5 and 6(1)(2)—Evacuee property—Automatic vesting of—Notification under s 6(1) issued at latter stage—Effect of**

S 5 contemplates automatic vesting of the properties of evacuee in the custodian and under s 6(2) the Custodian can take action after the vesting of the evacuee property, not necessarily after issue of notification. Issue of notification under s 6(1) is distinct from the vesting of evacuee property under s 5. The effect of delay in the issue of notification is that the claimants can raise objection even at a much later stage.

Special Appeal No 98 of 1971 against the judgment and order passed in Writ Petition No 647 of 1968

*Mohd Husain*, for the Petitioner

*G T Wadwani*, for Respondent no 1

*R K Varma*, for Respondent no 3

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ASSISTANT  
CUSTODIAN  
GENERAL,  
EVACUEE  
PROPERTY  
—

D S MATHUR, J —This is a special appeal by Ashiq Husain, petitioner, against the order of a learned single Judge partly allowing and partly dismissing the writ petition moved by him and by Smt Hanifa Bibi, respondent no 4

The material facts of the case are that one Yadan was a resident of Uttar Pradesh having a house in mohalla Aliganj of the town of Tanda in district Faizabad but had shifted to Kamtee in Madhya Pradesh in 1940 and migrated to Pakistan in or before 1949. The appellant Ashiq Husain, purchased the house from Yadan in 1960. It was after a few years that the Custodian gave notice to petitioner no 1 under s 8(4) of the Administration of Evacuee Property Act (Act XXXI of 1950) to show cause why damages be not recovered from him for being in unauthorised possession of the abovementioned house which was an evacuee property and had vested in him. The notice is dated 5th November, 1956.

The learned single Judge was of opinion that cl (i) of s 2(c) of U P Ordinance I of 1949 did not apply to Yadan, and the mere fact that he had migrated to Pakistan could not show that he was residing in Pakistan. It was in these circumstances that the revision was remanded for fresh hearing, keeping the observations made in the writ petition in mind. In substance, therefore, if Yadan was a resident of Pakistan the property was evacuee property and the action taken by the Custodian was proper.

The first Ordinance to be passed in respect of evacuee property, material for the decision of this case, is U P Ordinance No 1 of 1949. S 2(c) defined 'evacuee'. The definition of 'evacuee property' contained in s 2(d) of the Ordinance flows from the term 'evacuee'. As laid down in cls (i) and (ii) of s. 2(c) of this Ordinance 'evacuee' means any person—

'(1) who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has on or after the 1st day of March, 1947 left any place in the United Provinces for any place outside the territories now forming part of India, or

(11) who is resident in any place now forming part of Pakistan and is for that reason unable to occupy, supervise or manage in person his property in the United Provinces or whose property in the Province has ceased to be occupied, supervised or managed by any person, or is being occupied, supervised or managed by an unauthorised person."

Yadan was not living in Uttar Pradesh during the material period and, therefore, cl (1) is inapplicable. Cl (11) applies to a resident in any place now forming part of Pakistan. It was contended that cl (11) of s 2(c) applied to only those persons who were residents in any place now forming part of Pakistan on the 15th of August, 1947, and not to those who had later migrated from India to Pakistan. Cl (11) has been worded generally and we see no justification to give a restricted meaning to this provision.

Reliance was placed upon s. 8(1)(b) of the Administration of Evacuee Property Act, 1950 wherein it is provided that in cases falling under this category the property shall be deemed to have vested in the Custodian from the 15th day of August, 1947. S 8(1)(b) was incorporated in the subsequent enactment to lay down from which date the property shall be deemed to have vested in the Custodian and not to restrict the scope and meaning of the expressions 'evacuee' or 'evacuee property'. In any case, any new provision in a

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subsequent enactment cannot be utilised to restrict the general scope of the provisions in the earlier enactment. We, therefore, agree with the learned single Judge that a person who had migrated to Pakistan after 15th of August, 1947 and was residing in Pakistan was also covered by cl (ii) of s 2(c) of U P Ordinance no 1 of 1949. The provision was, however, not applicable if after migration the person settled down in a country other than Pakistan.

U P Ordinance No 1 of 1949 was replaced by Central Ordinance No XII of 1949 as amended by the Amending Ordinance No. XX of 1949. This Central Ordinance came into force in Uttar Pradesh on 23rd August, 1949. The Central Ordinance has been worded in the same manner as U P Ordinance no 1 of 1949. The definition of 'evacuee' contained in this ordinance is the same as in U P Ordinance No 1 of 1949. The evacuee property vested in the Custodian in the same manner.

When the Central Ordinance was made applicable to Uttar Pradesh s 41 was incorporated in the Central Ordinance to make it clear that anything done or any action taken under the U P Ordinance shall be deemed to have been done or taken under the Central Ordinance No XII of 1949 as amended by the Ordinance No XX of 1949. In the instant case no action had been taken since after the vesting of the evacuee property in the Custodian and, therefore, s 41 is inapplicable, but by virtue of s 5(1) of the Central Ordinance No XII of 1949 as amended by Amending Ordinance No XX of 1949 there was automatic vesting as was the case under U P Ordinance No 1 of 1949. Consequently, even if it be assumed that on U P Ordinance No 1 of 1949 lapsing the Custodian was divested of the property, there was an immediate vesting of the property in the Custodian by virtue of the Central Ordinance.

It was also contended that s 6(1) of these Ordinances contemplated a notification specifying the properties which had vested in the Custodian under the Ordinances and when no notification was issued the property cannot be deemed to be evacuee property, nor can be taken to have vested in the Custodian. This contention is against the spirit of ss. 5 and 6. S 5 contemplates automatic vesting of the properties of evacuees in the Custodian and under s 6(2) the Custodian can take action after the vesting of the evacuee property, not necessarily after issue of notification. Issue of notification under s 6(1) is distinct from the vesting of evacuee property under s 5. The effect of delay in the issue of notification is that the claimants can raise objection even at a much later stage.

Ordinance No XII of 1949 as amended by Ordinance No XX of 1949 was repealed by Central Ordinance No XXVII of 1949. Under this enactment notice under s 7 was necessary before any property could be declared evacuee property but in s 8(2) thereof it was clearly provided that if immediately before the commencement of this Ordinance any evacuee property had vested in the Custodian under any law repealed hereby, it shall be deemed to have vested in the Custodian appointed or deemed to have been appointed for the province under this Ordinance, and shall continue to so vest. This provision makes it clear that in respect of evacuee property which had already vested in the Custodian no fresh action under s 7 was to be taken. In other words, therefore the property in dispute shall be deemed to have vested in the Custodian under s 8(2) in case it was evacuee property which had vested in the Custodian under the earlier Ordinances, to put it differently, Yadan was an 'evacuee' as defined in cl (ii) of s 2(c) of U P Ordinance.

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nance No I of 1949 and in the Central Ordinance No. XII of 1949 as amended by Amending Ordinance No XX of 1949 No comments need be made on the effect of s 55(3) as in the instant case the Custodian had not taken any action, nor had he taken any proceeding under any of the Ordinances

Central Ordinance No XXVII of 1949 was replaced by the Administration of Evacuee Property Act, 1950 (Act XXXI of 1950) It contains a similar provision as s 8(2) of the Ordinance Consequently, if Yadan is an evacuee under U P Ordinance No I of 1949 and Central Ordinance No XII of 1949, as amended by Ordinance No XX of 1949, his properties shall be evacuee property which had automatically vested in the Custodian, and these properties shall still continue to be vested in the Custodian even though no action under s 7 was taken

The special appeal has, therefore, no force and is hereby dismissed Costs shall be easy

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr Justice Jagmohan Lal\**

HARI SHANKER

.. APPELLANT,

v

NARENDRA PRATAP BAHADUR

SINGH AND OTHERS

RESPONDENTS.

U. P. Zamindari Abolition and Land Reforms Act, 1950, ss 6 and 9—*Building site—vesting of—Word “Held”—Meaning of.*

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 March, 25

Under the terms of this agreement the land on which these shops were constructed belonged exclusively to the plaintiffs, while the shops, constructed on that had belonged to the defendant—appellant and that both the parties could not be held to be the joint owners of the shops or the land. Once it is found that these shops belonged to the defendant, their site would be deemed to be settled with them under s. 9. If a building is found to belong to a person, the question of its being “held” within the meaning of s. 9 does not arise. Ordinarily, a building is held by the same person to whom it belongs. If, however it belongs to one person but is held by another the latter would hold it either by virtue of an inferior right granted to him by the owner, for example, as a tenant or he would hold it adversely against the owner. In either case the settlement shall not be deemed to be made with him within the meaning of s. 9.

—1950, s. 6(a)(i)—Expression “Abadi sites” includes sites covered by building

There are no qualifying words, before the expression “abadi sites” and as such it would govern both the vacant sites as well as the sites covered by building

*Budhan Singh v. Nabi Bux* (1) referred to

Second Civil Appeal No. 735 of 1969 against the judgment and decree dated 24th August, 1959 passed by A. B. Mathur, Civil Judge, Bara Banki in Civil Appeal No. 1969 of 1958

*Naziruddin and S. K. Vidyarthi*, for the Appellant

*N. Banerji and S. K. Srivastava*, for Respondents.

J. M. LAL, J. —This second appeal arises out of a suit filed by the plaintiff-respondent nos. 1 to 7 for recovery of their half share in the rent realised by the defendant-appellant from the defendant-respondents nos. 8 to 16, to whom certain shops had been let out. The history, as regards these shops, was that before they had been constructed the plaintiffs-respondents were the Zamindars of this site. Some time before the abolition of the Zamindari, that is on 24th September, 1951, the defendant-appellant approached the Zamindars and requested them to give that land

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\*While sitting at Lucknow

(1) AIR 1962 All 48 (F. B.)

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to him for construction of the shops. The Zamindars accepted this request subject to certain terms which were embodied in a written agreement dated 24th September, 1951 executed between them. One of the terms was that on this Part I land the defendant-appellant would construct the shops at his own expense but the plan of construction shall be approved by both the parties. After the shops had been constructed they would be let out with the consent of both the parties and the rent realised from the tenants of the shops shall be divided half and half between them. It was, however, specifically provided in this agreement that the ownership of the land would always vest in the Zamindars while the ownership of the constructions shall vest in the defendant-appellant, but the two ownerships shall not be separated from each other and none of the parties can transfer the ownership of his individual property. The agreement will remain in force for ever and be binding not only on the parties but their successors also.

After the abolition of Zamindari the defendant-appellant alone started realising rents from the tenants of these shops and appropriating those amounts to himself without paying any share to the plaintiffs-respondents. The plaintiffs-respondents, therefore, filed a suit for recovery of their half share in the rents so realised by the defendant-appellant.

The suit was contested by the defendant-appellant on the ground that the plaintiffs' ownership in the site of these shops vested in the State Government under s 6 of the U P Zamindari Abolition and Land Reforms Act and thereafter the same shall be deemed to have been settled with the appellant under s 9, whose shops stood on that land. As such, the plaintiffs could not recover any share of the rent from the appellant in



puissance of this agreement, which could be enforced, if at all, by the State Government through Gaon Sabha under cl (vi) of s 26 of the U P Zamindari Abolition and Land Reforms Rules

The trial court held that both the shops, existing on the land in question, belonged to both the parties and as such their site shall also be deemed to be settled with both of them under s 9. On this finding the plaintiffs' claim for half of the share in the rent was decreed against the defendant-appellant.

On an appeal filed by the defendant-appellant, the lower appellate court disagreed with the finding of the trial court that the shops in question belonged to both the parties. According to the learned Civil Judge, in view of the specific terms contained in the agreement dated 24th September 1951, the shops belonged exclusively to the defendant-appellant and only their site belonged to the plaintiffs, but he was of the opinion that the shops shall be deemed to be held by both the parties within the meaning of s 9 and as such both the parties were still entitled to share their rent half and half according to the terms of the agreement. The appeal was accordingly dismissed.

It is against this decision that the defendant-appellant has come before this Court by filing this second appeal.

I heard the learned counsel for the parties and also perused the agreement dated 24th September, 1951. I agree with the lower appellate court that under the terms of this agreement the land on which these shops were constructed belonged exclusively to the plaintiffs, while the shops constructed on that had belonged to the defendant-appellant and that both the parties could not be held to be the joint owners of the shops or the land. Once it is found that these shops belonged to

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the defendant, then site would be deemed to be settled with them under s 9. If a building is found to belong to a person, the question of its being 'held' within the meaning of s 9 does not arise. Ordinarily, a building is held by the same person to whom it belongs. If, however, it belongs to one person but is held by another the latter would hold it either by virtue of an inferior right granted to him by the owner, for example, as a tenant or he would hold it adversely against the owner. In either case the settlement shall not be deemed to be made with him within the meaning of s 9. The tenant holds it for and on behalf of the owner and not in his own right for the purpose of s 9, while the holding of the trespasser is no holding in the eye of law for the purpose of s 9 as was held by a Full Bench of this Court in *Budhan Singh v Nahi Bux* (1) which decision was confirmed in appeal by the Supreme Court also in *Budhan Singh v Nahi Bux* (2). In this case the respondent had built a house as Riyaya on the land of the appellant who was the Zamindar of the village with his permission. He lived in this house till 1947 when he temporarily left it due to communal disturbances without any intention to abandon it. He returned in 1948 after normal conditions were restored. But in the meantime the appellant had entered in possession of that house which was in a dilapidated condition and included the land in his own house which adjoined this house and constructed a new house on it. The respondent filed a suit for recovery of possession against the appellant some time in 1950 or 1951. It was decreed by the trial court on 10th January, 1952. The defendants filed an appeal which was dismissed by the Civil Judge on 17th July, 1952. By this time the U. P. Zamindari Abolition and Land Reforms Act had come in force with effect from 1st July, 1952. When the case came

(1) A.I.R. 1962 All 48 (F B)

(2) A.I.R. 1970 S.C. 1880.

in second appeal before this Court a Full Bench of this Court repelled the contention of the appellants that since on 1st July, 1952 he was in possession of the site and the new house built on it belonged to him, the land shall be deemed to be settled with him under s 9. The Bench ruled that the word 'held' in s 9 means lawfully held. The Supreme Court was of the view that though the new house had been built by the defendant-appellants after pulling down the old dilapidated house of the plaintiff-respondent, that new house shall in the eye of law be deemed to belong to the plaintiff-appellants as a substitute for the old one. The defendants-appellants who entered in wrongful possession of the house could not be deemed to be holding the house within the meaning of s 9 when the owner had filed a suit for possession against him within limitation which was pending on the date of vesting.

These decisions on which reliance is placed on behalf of the plaintiff-respondent are of no help to them. The decision of the Supreme Court shows that under s 9 the site shall be deemed to be settled with the person to whom the house existing thereupon belongs or is deemed to belong. The only possible case in which it may be deemed to be settled with the person who is in possession of the building is when it does not belong to any other person or when the person to whom it belonged has allowed his remedy to recover possession of it to be barred by limitation by the date of vesting, that is, 1st July, 1952. In such a case the owner can be said to have lost his title under s 28, Limitation Act and the trespasser to have acquired title by adverse possession.

It is not the case here. In this case there is a categorical finding of the lower court that the shops belonged exclusively to the defendant-appellant and not jointly to him and the plaintiff-respondents. That being

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so, the settlement under s 9 shall be deemed to have been made with him and not with the persons holding them, assuming they are different persons. I am unable to agree with the learned Civil Judge that the shops shall be deemed to be jointly held within the meaning of s 9 by the plaintiff-respondents and the defendant-appellant, simply because the former by virtue of their ownership of the site of these shops, were entitled to receive a share in the rent of these shops. If a building exclusively belonging to one of the partners is used for the business of partnership and as such it is in the occupation of the partnership firm, its site cannot be deemed to be settled with the firm simply on the basis of this occupation, but it shall be deemed to be settled only with the individual partner to whom it belongs within the meaning of s 9. The view taken by the lower court on this point is erroneous.

It was next argued on behalf of the plaintiffs that the proprietary rights and other rights which the plaintiffs had in the land on which these shops were constructed under the terms of the agreement shall not vest in the State Government under s 6 of the H P Zamindari Abolition and Land Reforms Act and as such the plaintiffs were entitled to recover their half share from the defendant-appellant. The contention of the learned counsel for the plaintiff-respondents is that the expression '*abadi sites*' used in sub-cl (i) of cl (a) of s 6 refers only to vacant sites and not to the sites on which some buildings were standing at the time of vesting. This contention cannot obviously be accepted because there are no qualifying words before this expression '*abadi sites*' and as such it would govern both the vacant sites as well as the sites covered by buildings. If the sites covered by the buildings had not vested in the State Government there was no ac-

casation for the State Government to settle them with the owners of the building under s 9 As held by the Supreme Court in *Budhan Singh v Nabi Bux* (1) there was first vesting of sites under s 6 and then their settlement under s 9 In my opinion, s 6 is all inclusive and all the right, title and interest which the plaintiffs had in the site of these shops vested in the State Government under s 6 The plaintiffs were entitled to receive half share in the rent of these shops in terms of this agreement only so long as they were the owners of the site As soon as their right, title and interest in the site vested in the State Government under s 6, they were no longer entitled to receive any share of the rent payable by the tenants of these shops This share in the rent was in fact in the nature of rent payable to the owner of the site under the terms of the agreement After the abolition of the Zamindari, it is the Gaon Sabha which can claim it under r 26(vi) of the U P Zamindari Abolition and Land Reforms Rules

Accordingly, I allow this appeal, set aside the judgment and decree passed by the courts below and dismiss the plaintiffs' suit In the circumstances of the case, the parties are left to bear their own costs

*Appeal allowed*

### APPELLATE CIVIL

*Before Mr Justice Jagmohan Lal and Mr Justice Prem Prakash\**

STATE OF U P

APPELLANT,

*v.*

K S BHATNAGAR

RESPONDENT

**Civil Service—Fundamental Rules r. 56—Proviso (i), Civil Service Rules, r 450—Retirement under, if can be termed as forced retirement within the meaning of r 28(i)(vii) of**

\*While sitting at Lucknow.

(1) A I R. 1970 S C 1880

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*U P Rules of Business framed under Art 166(3) of the Constitution of India so as to require the submission of file to the Chief Minister—Forced retirement—Meaning of*

Superannuation retirement can by no stretch of imagination be called as "forced retirement" though it may fall within the expression "compulsory retirement" used in the terminology of the service rules. Retirements under the proviso to F R 56 and Civil Service Regulation 460 which stand on the same footing as superannuation retirements inasmuch as none of them involves any penal consequences, are also not "forced retirements" within the meaning of item (vii) of sub-r (1) of r 28 of U P Rules of Business framed under Art 166 (3) of the Constitution of India.

Expression "forced retirement" used under r 28(1)(vii) of the U P Rules of Business can only mean retirement which is forced on a gazetted servant as a measure of punishment.

*Held* the mere fact that the decision to retire the respondent was taken at the level of the Irrigation Minister and the file was not submitted to the Chief Minister does not invalidate the order of retirement passed under proviso to r 56 of the Fundamental Rules.

*State of Rajasthan v Sripal Jain* (1), explained and applied **Fundamental Rules, r 56 amended by U P Fundamental Rules, r 56 (Amendment and Validation) Act, 1970, Proviso (1) and expl (1)—Compulsory retirement under public interest—Presumption—Burden of proving otherwise lies on the servant—Executive instructions—Statutory force of**

R 56 of the Fundamental Rule requires that after a Government servant attains the age of 55 he can be retired by the appointing authority at any time on giving him three months' notice or salary in lieu thereof without assigning any reason. Such a decision would be taken by the appointing authority if it appears to that authority to be in public interest though it need not be recited in the order. The rule does not lay down that if the appointing authority on the eve of a government servant attaining the age of 55 has once taken decision that he may be allowed to continue up to the age of 58 it cannot subsequently change its mind and retire him at any time before he attains the age of 58 if such retirement appears to that authority in public interest.

Executive instructions issued under explanation (1) can have no statutory force in view of Full Bench decision in *Iqbal Narain v State* (1). An order of retirement, if challenged, has to be looked into whether or not it is in public interest, with an initial presumption that such order is in public interest and placing the burden on the servant to prove that it is not in public interest.

(1) AIR 1963 SC 1323

(2) AIR, 1971 All 178

*Sant Ram Sharma v State of Rajasthan* (1), referred to  
 Constitution of India Art 226—*Writ—Practise and procedure—*  
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A new allegation of fact cannot be made in the rejoinder—  
 affidavit without the permission of the court unless it was in  
 reply to some facts disclosed in the counter—affidavit. If a  
 new fact is allowed to be introduced in the rejoinder—affidavit  
 opportunity ought to have been given to the other side to file  
 a further counter—affidavit in relation to that fact.

Special Appeal no 122 of 1971 against the judg-  
 ment and order dated 24th October, 1971 passed by  
 K B SRIVASTAVA, J in Writ Petition no 627 of 1970  
*K S Verma, Chief Standing Counsel, for the State*  
*S D Misra, Advocate, for the Respondent*

JAGMOHAN LAL, J —This special appeal is directed  
 against a judgment dated 26th October, 1971 passed  
 by a learned single Judge of this Court, under which  
 he allowed the writ petition of the respondent and  
 quashed the order of his retirement passed by the State  
 Government under Fundamental Rule 56 and further  
 issued a *mandamus* requiring the Government to re-  
 instate the respondent in service and pay his salary and  
 allowances etc till he attained the age of 58 years.

The respondent K S Bhatnagar was a Superintend-  
 ing Engineer in the Irrigation Department of the Gov-  
 ernment of U P. His date of birth was 4th October,  
 1914. He was due for retirement on 3rd October,  
 1972 on attaining the age of 58 years but the State  
 Government purporting to act under the proviso to r  
 56(a) of the Fundamental Rules (to be hereinafter  
 called as the Rules) retired him from service with effect  
 from 20th April, 1970 after serving a notice on him  
 and paying him three months' salary in lieu of the  
 notice.

The respondent challenged this order on the ground  
 that it was *mala fide* and arbitrary which had been  
 passed in contravention of the executive instructions

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issued by the State Government laying down the guidelines for exercise of the power under the proviso to r 56(a). The order was further challenged as lacking in authority on account of the decision being taken by the then Irrigation Minister without submitting the file to the Chief Minister as required by r 28(1)(vii) of the U P Rules of Business framed by the Governor under Art 166(3) of the Constitution. These pleas of the respondent found favour with the learned single Judge who allowed the writ petition with costs. Feeling dissatisfied with this order the State Government has filed this special appeal.

We heard the learned counsel for the parties. The learned Chief Standing Counsel contended that the allegations made by the respondent in his affidavit regarding the *mala fides* of the then Minister of Irrigation were wholly vague and untenable. Moreover, the Minister concerned was not personally impleaded in the writ petition. By the time the counter-affidavit was filed in the case on behalf of the Government he had also ceased to be the Minister of Irrigation. So he was not available for filing his own affidavit. This circumstance about the Minister not filing his own counter-affidavit, however, weighed heavily with the learned single Judge in recording his finding that the order was *mala fide*.

When this appeal came for hearing before another Bench it was directed by that Bench that Sri Virendra Verma, the then Irrigation Minister, should be impleaded as a respondent to this appeal and he should be given an opportunity to file a counter-affidavit, if he so liked, to refute the allegations made against him by the respondent in his writ petition. Sri Virendra Verma was accordingly impleaded as a respondent. He filed his counter-affidavit dated 19th October, 1972 in this special appeal to which the respondent filed his



rejoinder dated 2nd January, 1973 After taking into consideration this additional material we have to see whether the plea of *mala fide* taken by the respondent has been established

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The respondent alleged in para 15 of his writ petition that one A N Chauhan was an Assistant Engineer serving under him when he was posted as Superintending Engineer, VI Circle, Lucknow at the relevant time The respondent transferred this Assistant Engineer from one sub-division to another in his circle and gave him some adverse entries Subsequently he was placed under suspension and was charge-sheeted under the orders of the State Government which was at that time headed by Sri C B Gupta, Chief Minister The respondent further contended that Sri Virendra Verma who became Irrigation Minister in the new Government headed by Sri Charan Singh, Chief Minister, became hostile to the respondent on account of his transferring, and giving bad entries to, A N Chauhan, and as a result of this hostility, he passed the impugned order of compulsory retirement of the respondent even against the recommendation of the Irrigation Secretary It was not stated by the respondent as to what interest Sri Virendra Verma had in A N Chauhan so as to become hostile against the respondent simply because the respondent had transferred A N Chauhan and given some adverse entries to him The allegation that Sri Virendra Verma became hostile to the respondent is more an expression of opinion than a statement of fact Such a vague allegation could hardly be held to establish *prima facie* the plea of *mala fide* The learned single Judge, however, took into consideration a subsequent statement made by the respondent in para 19 of his rejoinder dated 21st December, 1970 in which he alleged that A N Chauhan had approached Sri Viren-

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dra Verma who got annoyed with the respondent on account of disciplinary steps which he had taken against A N Chauhan. For one thing, a new allegation of fact could not be made in the rejoinder-affidavit without the permission of the Court unless it was in reply to some facts disclosed in the counter-affidavit. Secondly, if a new fact is allowed to be introduced in the rejoinder-affidavit, opportunity ought to have been given to the other side to file a further counter-affidavit in relation to that fact. Thirdly, even this new allegation is as vague as the original allegation and amounts to an expression of opinion rather than a statement of fact. If A N Chauhan, Assistant Engineer, against whom disciplinary proceedings had been started, approached Sri Virendra Verma, the then Minister of Irrigation, it does not necessarily mean that Sri Virendra Verma had any special interest in that man. Any aggrieved government servant can approach the Minister concerned in these days. The respondent did not disclose any facts as to in what manner Sri Virendra Verma expressed his annoyance to him on account of the disciplinary proceedings being started against A N Chauhan.

In his counter-affidavit filed in this special appeal Sri Virendra Verma has denied that he had hostility against the respondent on account of A N Chauhan. He also stated on oath that he had no knowledge that the respondent had transferred A N. Chauhan or had given him any adverse entries. He further swore that serious complaints were received against the respondent and after seeing the note of the Deputy Secretary, Irrigation, which was also endorsed by the Secretary he decided to retire the respondent compulsorily. He denies that this order was passed by him on account of bias or ill-will.

The respondent in his rejoinder-affidavit dated 2nd January, 1973 filed in this special appeal in reply to the counter-affidavit of Sri Virendra Verma reiterated his original allegations about the order passed by Sri Virendra Verma being *mala fide* and came out for the first time with the allegation that A N Chauhan hailed from the same district, Muzaffarnagar to which Sri Virendra Verma belonged. This shows how in his efforts to impute some motive to Sri Virendra Verma in passing the impugned order he is disclosing these facts in dribblets as and when it suits him to do so. In our opinion, the mere fact, assuming it to be true, that Sri Virendra Verma and A N Chauhan belonged to the same district, is not sufficient to prove that the former as Minister of Irrigation had any special interest in the latter, much less to infer therefrom that he would become hostile to the respondent so as to act maliciously in passing the impugned order of the respondent's retirement. On this material the plea of *mala fide* cannot be said to have been established in this case.

The next point that was argued by the learned Chief Standing Counsel was that the finding recorded by the learned single Judge that the impugned order was lacking in authority because the decision had been taken at the level of the Minister for Irrigation without submitting the file to the Chief Minister, is erroneous. The impugned order which is Ann 3 to the writ petition, was passed in the name of the Governor and was authenticated in the manner prescribed by Art 166(2) of the Constitution which also provides that the validity of an order which is so authenticated shall not be called in question on the ground that it is not an order made by the Governor. It was contended on behalf of the respondent that in this case it is an admitted fact that the decision to retire the respondent was taken by the Mini-

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ster for irrigation and the approval of the Chief Minister was not taken. He relies on item no (vii) of sub-r. (1) of r. 28 of the U P Rules of Business framed under Art 166(3) of the Constitution which provides that all classes of cases relating to the following items shall be submitted to the Chief Minister before the issue of orders

“Proposals for the dismissal, removal or forced retirement of any Gazetted Officer”

A similar rule existed in Rajasthan Rules of Business which was rule no 31. The relevant portion of that rule provided—

“The following classes of cases shall be submitted to the Governor and the Chief Minister before the issue of orders—

(vii) (a) Proposals for dismissing, removing or compulsory retiring of any officer where the appointing authority is the Government

(b) Where a review petition is proposed to be rejected and it is against an order issued after submission to the Governor under item (vii)(a) of r 31

(c) In a case where, on review, the Governor decides to enhance the penalty already imposed and the enhanced penalty is one of dismissal, removal or compulsory retirement of an officer whose appointing authority or appellate authority is Government”

This rule of Rajasthan came for interpretation before the Supreme Court in a case of similar nature in *State of Rajasthan v Sripal Jain* (1). Their Lordships of the Supreme Court held that though the words “compul-

(1) AIR 1968 SC 1323

sory retiring of any officer where the appointing authority is the Government' appearing in item (vii) (a) are general and are not qualified by the words "as penalty" and may be open to the interpretation that all the three kinds of compulsory retirement mentioned above (including the superannuation retirement) must be referred to Governor, reading these words in item (vii)(a) in the collocation in which they appear, they refer only to compulsory retirement as a penalty

The learned single Judge tried to distinguish this case so as not to be applicable to the present case on two grounds in the first place, he thought that compulsory retirement was not one of the penalties provided in Classification, Control and Appeal Rules (C C A Rules) applicable to government servants of this State though in the corresponding rules of Rajasthan State 'compulsory retirement' was also one of the penalties Secondly, he observed that in interpreting sub-item (a) of item (vii) their Lordships of the Supreme Court had also looked into the provisions contained in sub-items (b) and (c) which are not found in relation to item no (vii) (a) of r 28 of the U P Rules of Business

The learned Chief Standing Counsel pointed out that though compulsory retirement was not provided as one of the penalties under the C C A Rules of this State it was provided as a penalty in addition to the penalties provided in those rules, by sub-r. (2) of r 9 of the U P Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 This sub-rule provides

"In addition or as alternative to the punishments defined in the Civil Services (Classification, Control and Appeal) Rules, the Tribunal may also recommend the compulsory retirement with or without full or proportionate pension, or with or with-

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out gratuity or compassionate allowance, as it may deem suitable "

From this provision, which was not perhaps brought to the notice of the learned single Judge, it is evident that in this State also for government servants of the class to which the respondent belongs, compulsory retirement can be awarded as a penalty, and in such retirement even the entire pension and gratuity earned by a government servant on account of his past services can be forfeited. So, the first ground of the learned single Judge for distinguishing the decision of the Supreme Court is not tenable. The other ground also does not appear sound. It is no doubt true that in interpreting the expression of "compulsory retiring of any officer" used in sub-item (a), their Lordships of the Supreme Court had reinforced their argument by referring to sub-items (b) and (c) also which are not found in our Rules. But that interpretation was not entirely based on that ground. Even independently of these sub-items (b) and (c), their Lordships had inferred that the collocation in which these words had been preceded by the words 'dismissing' and 'removing' they referred only to compulsory retirement as a penalty and not the other three types of retirement, namely, superannuation retirement, retirement under F R 56 and the retirement under r 460 of Civil Service Regulations. These three classes of retirement which are applicable to government servants in this State also did not entail any penalties and the full pension and gratuity admissible to a government servant on account of his past services is payable to him in case of these retirements. So far as retirement under F R 56 is concerned, it is the settled law that it does not amount to any penalty. In our opinion the expression 'forced retirement' used in r 28(vii)(a) is more indicative of the penal aspect of retirement than the words 'com-

pulsory retirement' used in the Rajasthan Rules which are capable of including therein even such innocent and routine retirements as come to all government servants after attaining the age of superannuation. The learned single Judge has also conceded that the cases relating to superannuation retirement would not fall under item (vii)(a) and such cases need not be submitted to the Chief Minister, though he thinks that the cases of other two types of retirement under F R 56 and Reg 460 of the Civil Service Regulation would be covered by the expression 'forced retirement', because in such cases a government servant has to retire prior to the time up to which he would have ordinarily liked to serve. In our opinion, this distinction is not comprehensible. It depends upon the mental make up and the individual financial and family circumstances of a government servant as to how he takes his superannuation retirement. There may be some government servants who long for their hard earned rest on superannuation retirement after devotedly and honestly serving the Government for the prescribed period, but most of the government servants on account of the present day economic hardship, dread their superannuation retirement and take it as a 'forced retirement' in the sense in which this expression is understood in common parlance. But in the terminology of service rules the expressions 'retirement', 'compulsory retirement' and 'forced retirement' have come to acquire special meanings depending on the context in which they are used. We agree with the learned single Judge that a superannuation retirement can by no stretch of imagination be called as 'forced retirement' though it may fall within the expression 'compulsory retirement' used in the terminology of service rules. We are, however prepared to go a step further which is a necessary corollary to this proposition, namely, that retirements

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under the proviso to F R 56(1) and Civil Service Regulation 460 which stand on the same footing as superannuation retirements inasmuch as none of them involves any penal consequences, are also not "forced retirements" within the meaning of the said r 28(1) (vii), looking to the context in which this expression has been used in that rule. It may be pointed out that a retirement under F R 56 is not always a one-sided affair. A government servant can also after attaining the age of 55 years seek his retirement after giving three months' notice. In such a case it cannot be termed as 'forced retirement'. In our judgement the interpretation placed by their Lordships of the Supreme Court in *State of Rajasthan v Sripal Jain* (1) on the expression 'compulsory retirement' used in Rajasthan Rule is applicable with greater force to the expression 'forced retirement' used in corresponding U P rule in the same connection, preceded by the words 'dismissal', 'removal'. Compulsion may come by course of events also such as a person attaining the age prescribed for superannuation retirement. But force is usually applied by human agency. So 'forced retirement' in the context in which these words are used can only mean retirement which is forced on a gazetted servant as a measure of punishment. In that view of the matter the mere fact that the decision to retire the respondent was taken at the level of the Irrigation Minister and the file was not submitted to the Chief Minister does not invalidate this order.

The precedent cited by the respondent that when a Chief Engineer was proposed to be retired under F R 56 on attaining the age of 55 the file had been submitted to the Chief Minister, is of no help in deciding the controversy before us. Even if a case does not fall within the purview of r 28, it is always open to the

(1) AIR 1969 SC 1302



Minister concerned to submit the file to the Chief Minister. The Chief Minister has also a discretion to send for any important file which he wants to see, but that is his own discretion. If the Irrigation Minister did not in this case choose to submit the file to the Chief Minister, it will not invalidate the order passed by him.

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The next point urged by the learned counsel for the appellant was that there was no breach of any statutory provision of the rule in passing the impugned order which purports to have been passed in public interest. He contends that the executive instructions on which reliance has been placed by the respondent are not part of the statutory rule so as to render the order invalid for any non-observance of those instructions and in this case even those instructions have not been contravened in any manner.

F R 56 was amended with effect from 1st January, 1964 when the age of retirement was raised from 55 to 58 with a proviso to retire any government servant on three months' notice after he had attained the age of 55. This amended rule was challenged and a Full Bench of this Court in *Kripa Ram Gupta v. R K Talwar* (1) held that this rule was violative of Arts. 14 and 16. Thereafter the State passed the Uttar Pradesh Fundamental Rule 56 (Amendment and Validation) Act, 1970 (U P Act no 5 of 1970) under which this rule was amended again with some modifications keeping in view the observations made by the Full Bench in the aforesaid case. This amendment was given retrospective effect from 1st January, 1964 and the decisions made and the actions taken previous to the passing of this Act were validated notwithstanding any judgment, decree or order of any Court. The material portion of this amended rule provides as follows:

(1) AIR 1970 All 296 (F.B.).

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“Provided that—

(1) the appointing authority may, at any time, without assigning any reason, require the government servant to retire on three months' notice or pay in lieu of the whole or part thereof, after he attains the age of 55 years, or such lesser age as together with the period of notice in lieu of which the pay is substituted would aggregate to 55 years, so, however, that in the case of pay being given in lieu of the whole or part of such notice the said period shall stand added to the government servant's qualifying service for the purposes of calculating the pension and the death-cum-retirement gratuity due to him and for no other purpose, or

(ii) the government servant may, after attaining the age of 55 years voluntarily retire after giving three months' notice to the appointing authority

Provided further that—

(1) the notice of voluntary retirement given under the first proviso by a government servant against whom a disciplinary proceeding is pending or contemplated shall be effective only if it is accepted by the appointing authority, subject to the condition that in case of a contemplated disciplinary proceeding, the government servant is so informed before the expiry of the notice,

(ii) the notice once given by a government servant under the first proviso shall not be withdrawn by him except with the permission of the appointing authority.

*Explanation*—(1) The decision of the appointing authority under the first proviso to require the government servant to retire as specified therein shall be taken if it appears to the said authority to be in the public interest, and the State Government may, from time to time, issue executive instructions indicating guiding principles in that behalf, but nothing herein contained shall be construed to require any record, in the order, of such decision having been taken in the public interest or to require the publication of such instructions.

(2) Every such decision shall, unless the contrary is proved, be presumed to have been taken in the public interest.

(3) 'Appointing Authority' means the authority which has the power to make substantive appointments to the post or service from which the government servant is required or wants to retire."

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This rule was again challenged and the matter went before a larger Full Bench of this Court in *Jeet Narain v. State* (1). This amended rule was upheld except the last portion of the Expl. (i) which provides "the State Government may, from time to time issue executive instructions indicating guiding principles in that behalf but nothing herein contained shall be construed to require any record, in the order, of such decision having been taken in the public interest or to require the publication of such instructions." This portion being severable from the rest of the rule was struck down and the Full Bench held that the order

(1) AIR 1971 All 178

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lines would be available from the provision contained in the rule itself that such retirement would be ordered in public interest, and the expression 'public interest' is well-known in law

In the meantime the validity of similar rule framed by other States and by the Central Government had been upheld by the Supreme Court. Reference may be made to *Shivachanna v State of Mysore* (1), *A K. Knupak v Union of India* (2) and *Union of India v J N Sinha* (3). So the validity of this rule after excluding the last portion of Expl (1) which had been struck down by the Full Bench, is no more open to challenge, nor it has been so challenged in this case. The rule as it will now stand only requires that after a government servant attains the age of 55 he can be retired by the appointing authority at any time on giving him three months' notice or salary in lieu thereof without assigning any reason. But such a decision would be taken by the appointing authority if it appears to that authority to be in public interest though it need not be recited in the order that the decision had been so taken in public interest. If a government servant challenges such an order, the burden lies on him to show that the decision was not in public interest.

The rule in its terms does not lay down that if the appointing authority on the eve of a government servant attaining the age of 55 has once taken decision that he may be allowed to continue up to the age of 58, it cannot subsequently change its mind and retire him at any time before he attains the age of 58 if such retirement appears to that authority in public interest.

(1) AIR 1965 SC 280.

(2) AIR 1970 SC 150

(3) AIR 1971 SC, 40

The respondent had tried to show that this order is not in public interest by alleging that it was *mala fide*, arbitrary and in contravention of the executive instructions contained in the Government Order dated 19th October, 1968 (Ann 6 to the Writ petition) and the D O dated 26th November, 1969 (Ann 1 to the writ petition). The plea of *mala fide* has already been negatived. In respect of the executive instructions it has been argued by the learned counsel for the respondent that they lay down sound guidelines for the appointing authority in dealing with cases of such retirements and as such even though they may not be statutory rules they will have that force and validity. In this connection, reliance is placed on the decision of the Supreme Court in *Sant Ram Sharma v State of Rajasthan* (1) in which it was held that while Government cannot amend or supersede statutory rules by administrative instructions, if rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. In our opinion after the aforesaid Full Bench decision these executive instructions can have no statutory force. An order of retirement, if challenged has to be looked into whether or not it is in public interest, with an initial presumption that such order is in public interest and placing the burden on the servant to prove that it is not in public interest.

Even assuming that these executive instructions issued under a provision of the rule which has been specifically struck down by the Full Bench, have still some binding force, we may proceed to examine if there has been any breach of these instructions. The instructions, contained in the earlier secret D O dated

(1) (1968) 1 S C R 111.

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19th October, 1963 were modified by the instructions contained in the Government Order dated 26th November, 1969. On most of the points the instructions contained in both these documents are similar. They lay down that six months before a government servant attains the age of 55 his record should be carefully examined by the appointing authority and a provisional judgment formed whether he should be retained on attaining the age of 55 years. Apart from the special cases in which a government servant is considered unsuitable for further retention on account of his integrity being doubtful or unsoundness of health, the criteria of judging the suitability of a person as laid down in the earlier D O was that he should be an average or above average officer. In forming that opinion the totality of his performance with particular reference to the entries earned by him in his character roll during the last five years should be taken into account. The subsequent Government Order made this criterion of judging the suitability of a government servant stricter by providing that the totality of his performance including the entries earned by him during the last ten years shall be scrutinised, and only those persons who are found to be above average should be retained and others weeded out. In both these documents there is a provision that once a decision has been taken to continue a government servant after the age of 55 years he should ordinarily be allowed to go on up to the age of 58 unless there are some exceptional circumstances which may justify the reopening of that decision. It is on this provision that an emphasis has been laid on behalf of the respondent.

It is an admitted fact that the case of the respondent was considered by the Government before his attaining the age of 55 and at that time a decision was taken that he may be allowed to continue up to the

age of 58. This decision had been taken prior to the issue of the Government Order dated 26th November 1969.

The contention of the learned Chief Standing Counsel is that since the criterion of judging the suitability of a person laid down in the later Government Order dated 26th November, 1969 is stricter than in the earlier one, the cases of those persons in which the earlier decision had been taken in the light of the previous D O could be re-examined and scrutinised in the light of the subsequent Government Order. On the other hand, the learned counsel for the respondent argues that a decision once taken under the earlier D O would be deemed a valid decision within the meaning of the later Government Order and as such it should not ordinarily be reopened unless there are exceptional circumstances. In other words, the contention of the learned Chief Standing Counsel is that those average officers who had been allowed to continue when their cases were examined on the basis of the prior D O are liable to be weeded out on examining their cases under the later Government Order unless they are at that time found to be above average. The contention on the other side is that the average officers who had been allowed to continue should not be retired unless there are exceptional circumstances justifying a re-opening of their cases. For the purposes of this case, it is not necessary for us to enter into this general question. The respondent himself has placed material on record to show that there were some subsequent developments in his case irrespective of the fact whether he was otherwise an average or above average officer.

It appears that the respondent purchased some land and set up a farm at Lucknow—Faizabad Road which was within his official circle. This land was purchased

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through seven sale deeds executed between 21st August 1967 and 29th December, 1967, the first six being in favour of his wife and the last one in favour of his minor daughter. The purchases were made for about Rs 45,000. A sum of Rs 8,000 was spent on the constructions of a tube-well and about Rs 30,000 were spent on other accessories and working expenses of the farm. According to the respondent, as explained by him in Ann. 17, part of this money was received by his wife from her brother as her share in her father's property, part as a loan from her brother and part as loans advanced to her by the respondent himself. The respondent did not obtain prior permission of the Government for making these purchases as required by 124 of the Government Servants Conduct Rules. His case is that since these purchases were made by his wife in her own name and in the name of her minor daughter, he was under an impression that prior permission of the Government was not necessary. He, however, reported the first purchase dated 21st August, 1967 to his Chief Engineer vide his letter dated 13th September, 1967 and the purchases made through other five sale deeds from 7th September, 1967 to 10th October, 1967 through his letter dated 2nd December 1967 about which the contention of the Government is that this letter is not available on the record. The last purchase dated 29th December, 1967 was not even reported to the Chief Engineer before 15th September, 1969 when an enquiry had already started in the matter.

It seems that there were some complaints received by the Government about the purchase of this land by the respondent and his devoting himself to his farming business while still in service. In that connection some queries were made from him by Shri M C Jauhari Chief Technical Examiner vide his D O letter dated



8th September, 1969 (Ann 16 to the Writ petition). A reply to these queries was given by the respondent in his letter dated 30th September, 1969 (Ann 17 to the Writ petition). The respondent alleges that as a result of this enquiry the only thing that was proved against him was that there was a technical breach of 24 of the Government Servants Conduct Rules on his part by not seeking prior sanction of the Government for making these purchases and the remaining charges were found to be false and frivolous. The contents of the other side is that several irregularities were found in connection with these transactions.

At the request of the learned counsel of the respondent we asked the Chief Standing Counsel if he was prepared to produce before the Court the file in which the impugned decision to retire the respondent was taken by the then Irrigation Minister or if he claimed privilege. The learned Chief Standing Counsel produced that file. We find that it contained a note by the Deputy Secretary which was endorsed by the Secretary Irrigation. That note first pointed to the serious lapses on the part of the respondent in not complying with the requirements of 24 of the Government Servants Conduct Rules in relation to the disposal of sale deeds about the purchase of land situated in his own circle. It was then suggested that the respondent may be transferred to some other circle since one of the complaints made against him was that he devoted himself more to looking after his farm than to his official work, and thereafter the matter may be referred to the C. I. D. to enquire if the source of money from which these purchases had been made had been satisfactorily explained. When the file was submitted to the Irrigation Minister he ordered that the respondent who had already attained the age of 55 years, having retired under F. R. 56 and thereafter it may be referred

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ed if it was necessary to have the enquiry made by the C I D. This supports the allegation made by Sri Virendra Verma in para 5 of his affidavit that he passed this order on 13th March, 1970 keeping in view the serious complaints received against the respondent, to which reference had been made by the Deputy Secretary, Irrigation, in his note endorsed by the Secretary, Irrigation. He further stated that this direction was repeated by him on 12th April, 1970 in compliance with which the formal order dated 18th April, 1970 (Ann 27) was issued under proper authentication as required under Art 166(2). Sri Virendra Verma further deposed that it was incorrect that it was pointed out to him that the file had to be submitted to the Chief Minister at the stage when the decision was taken by him. It was only at the stage of the formal order being drawn up that the office recorded a note to this effect, but the Secretary, Irrigation was of the opinion, which he noted on the file, that in this matter reference to the Chief Minister was not needed. On these facts which evidently were brought to the notice of the Government subsequently, the previous decision about retaining the respondent up to the age of 58 years, could be re-opened and fresh decision taken even in terms of these executive instructions.

If in these circumstances the Irrigation Minister decided to retire the respondent under F R 56, it cannot be said that the decision was not taken by him in public interest, or that it was arbitrary and motivated by extraneous considerations. As held by the Supreme Court in *Union of India v J N. Sinha* (1) the appropriate authority has the absolute right to retire a government servant if it is of the opinion that it is in public interest to do so, and if that opinion has been formed *bona fide*, its correctness cannot be challenged before

(1) AIR 1971 SC 40

courts The challenge made by the respondent that this opinion was based on collateral grounds or that it was an arbitrary or *mala fide* decision, has not been established on the facts of this case The order of retirement is not therefore liable to be quashed.

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We accordingly allow this appeal, set aside the judgment and order of the learned single Judge and dismiss the writ petition of the respondent But in the circumstances of the case we leave the parties to bear their own costs

*Appeal allowed*

## CIVIL MISCELLANEOUS

*Before Mr Justice K N Seth*

ALIGARH MUSLIM UNIVERSITY,

ALIGARH THROUGH ITS REGISTRAR PETITIONER,

*v.*

MUNSIFF, KOIL, ALIGARH

AND OTHERS

RESPONDENTS

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Aligarh Muslim University Act, 1920, ss 36(2) and 36-B—  
*Order of Tribunal—Student barred from taking admission in University—Suit for setting aside the order—Not maintainable.*

The various provisions of the Aligarh Muslim University Act provide complete machinery for redress of the grievance of a student Various Tribunals under the statute provide forum for determination of all disputes between the University and the students in respect of the rights and liabilities created under the provisions of the Act Sub-s (2) of s 36 makes the order of the Tribunal final and further lays down that no suit shall lie in any court in respect of the matter

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decided by the Tribunal. By virtue of sub-s (2) of s 36-A finality attaches to the order of Tribunal of Arbitration in a disciplinary action against a student and a civil suit to challenge the order of the Tribunal is expressly barred.

Civil Miscellaneous Writ No 7075 of 1972 connected with Civil Miscellaneous Writ No 7206 of 1972

*vs J Hayder, for the Petitioner*

*K S Sinha, and S C, for the Respondents*

K N SETH, J —The abovenoted writ petitions have been filed by the Aligarh Muslim University for quashing the proceedings in Suit No 437 and Suit No 438 of 1972 of the court of Munsif Koil, Aligarh, and for a direction to opposite-party no 1 not to proceed with the aforesaid suits. A common question of law arises in both the petitions and they can be conveniently disposed of by a common judgment.

Anil Kumar was admitted to 1st year M B, B S class of the University in the academic session 1972-73. He made a written report to the Dean Faculty of Medicine alleging that Wasil Ahmad Farooqi and Zafrul Islam, who were students of B U M S of the University, made indecent assault on him in room no 36 of the Mumtaz Hostel in the night of 19th August, 1972. An enquiry into the incident was conducted by the warden of the Mumtaz Hostel. He recorded the statement of Wasil Ahmad Farooqi and Zafrul Islam. The Proctor of the University also made a report of the incident to the Registrar with a request to place the matter before the Committee of Discipline. The Committee of Discipline in its meeting held on 22nd August 1972 resolved to serve a notice on Wasil Ahmad and Zafrul Islam (opposite-parties no 2) asking them to show cause why their names be not removed from the rolls of the University and why they should not be debarred from taking admission in the

University and its maintained institutions in future. The Committee authorised the Registrar to serve the show cause notices on opposite-parties no 2. The Registrar served the show cause notices. A copy of the minutes of the meeting of the Committee of Discipline was appended to the notices. Opposite-parties no 2 made applications praying for one month's time to prepare their defence and file a reply to the charges levelled against them. The Committee granted an extension up to 11th September 1972. It further resolved that if no explanation was received by the said date and the opposite parties no 2 failed to appear before the Committee, *ex parte* orders would be passed. Opposite-parties no 2 again requested the Registrar on 11th September, 1972 for further time on the ground that copies of statements of witnesses sought to be examined against them had not been supplied. The Committee of Discipline again met on 12th September, 1972. Wasi Ahmad Farooqi and Zafarul Islam had neither filed any explanations nor they were present before the Committee. Anil Kumar was present for cross-examination on the said date. The Committee of Discipline passed a resolution removing the name of the aforesaid two students from the rolls of the University and directing that they should not be admitted in the University and the institutions maintained by it until 16th July, 1971.

Wasi Ahmad and Zafarul Islam filed Suit Nos 437 and 438 of 1972 in the Court of Munsif, Koil, Aligarh, for a declaration that the resolution of the Committee of Discipline dated 12th September, 1972 was void. They further prayed for an injunction against the defendants restraining them from giving effect to the said resolution. Applications for an interim injunction were also made. The defendants filed objections to

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the said applications and after hearing the parties the learned Munsif issued an injunction by his order dated 27th October, 1972 restraining the defendants from giving effect to the impugned order dated 12th September, 1972. It was further directed that the plaintiffs shall be allowed to be treated alike in every respect with the other regular students provided the plaintiffs abide by the law and the directions of the authorities concerned. Thereafter the present petitions were filed by the University for the reliefs mentioned earlier.

The principal question for consideration in the petitions is whether the civil suit is maintainable. It was contended by the learned counsel for the petitioner that the Aligarh Muslim University Act provides complete machinery for the redress of the grievance of students against an order taking disciplinary action against them and the jurisdiction of the civil court in such cases is barred.

The Aligarh Muslim University Act by s 3 constitutes the Chancellor, the Pro-Chancellor and the Vice-Chancellor and the members of the Court, the Executive Council and the Academic Council as a body corporate known as the Aligarh Muslim University. S 19 lays down the powers and duties of the Vice-Chancellor who is made the principal executive and academic officer of the University and is authorised to exercise general supervision and control over the affairs of the University. S 27 provides for Statutes for various matters including procedure for appeal to the Executive Council by any employee or student against the action of any officer or authority of the University. Statute 35 provides that all powers relating to discipline and disciplinary action in relation to students shall vest in the Vice-Chancellor. Cl (2) provides that the

Vice-Chancellor may delegate all or any of his powers as he deems proper to the Proctor and to such other officers as he may specify in this behalf S 36-A reads as follows

"(1) Any student or candidate for an examination whose name has been removed from the rolls of the University by the orders or resolution of the Vice-Chancellor, Discipline Committee or Examination Committee, as the case may be, and who has been debarred from appearing at the examinations of the University for more than a year, may, within ten days of the date of receipt of such order or copy of such resolution by him, appeal to the Executive Council and the Executive Council may confirm, modify or reverse the decision of the Vice-Chancellor or the Committee, as the case may be

(2) Any dispute arising out of any disciplinary action taken by the University against a student shall at the request of such student be referred to a Tribunal of Arbitration and the provisions of sub-s (2) of s 36 shall, as far as may be, apply to the reference made under this sub-section"

S 36-B also confers on every employee and student a right of appeal to the Executive Council against the decision of any officer or authority of the University

In sub-s (2) of s 36 it is provided that any dispute arising out of a contract between the University and of its employee shall, at the request of the employee concerned, be referred to a Tribunal of Arbitration. It is also provided that the decision of the Tribunal shall be final, and no suit shall lie in any civil court in respect of the matters decided by the Tribunal. By virtue of sub-s (2) of s 36-A this provision is made

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applicable to any dispute arising out of any disciplinary action against a student

In view of the aforesaid provision it was contended that the Act and the Statute provide a complete remedy and the jurisdiction of the civil court to entertain a dispute of the present nature is barred. Reliance has been placed on *Dhulabhai etc v State of Madhya Pradesh* (1) wherein the principles regarding the exclusion of the jurisdiction of the civil courts have been laid down. The principle no. 1 says

"Where the statute gives a finality to the orders of the special Tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

As mentioned earlier the various provisions of the Aligarh Muslim University Act provide complete machinery for the redress of the grievance of a student. On the show cause notice being issued, the opposite parties could place their case before the Committee of Discipline. They had also a right to challenge the correctness of the order of the Committee of Discipline before the Executive Council which had power to confirm, modify or reverse the decision of the Committee. S. 36-A further empowered the student to have the dispute referred to a Tribunal of Arbitration. The Act not only provides a right of appeal against the order of the Committee of Discipline but gives a further right to have the dispute decided by a Tribunal of Arbitra-

(1) AIR 1960 SC 78



tion Various Tribunals under the statute provide forum for determination of all disputes between the University and the students in respect of the rights and liabilities created under the provisions of the Act. Sub-s (2) of s 36 makes the order of the Tribunal final and further lays down that no suit shall lie in any court in respect of the matter decided by the Tribunal. By virtue of sub-s (2) of s 36-A finality attaches to the order of the Tribunal of Arbitration in a disciplinary action against a student and a civil suit to challenge the order of the Tribunal is expressly barred.

The exception engrafted in principle no 1 referred to above would also be not attracted in the present cases. The opposite-parties no 2 were duly served with notices issued by the Committee of Discipline and they were asked to submit their explanation and appear before the Committee on 11th September, 1972. A copy of the minutes of the meeting of the Committee of Discipline was also appended to the notices. Similarly a copy of the statement of Anil Kumar, the complainant, who was the only witness in support of the complaint, was also sent to the opposite-parties. Opposite-parties no 2 made applications for one month's time to prepare their defence and to file a reply to the charges levelled against them. The Committee, however, granted them time up to 11th September, 1972. It was made clear that if no explanation was received by the aforesaid date and the opposite-parties failed to appear before the Committee *ex parte* orders would be passed. On 12th September 1972 the Committee of Discipline met again. On that date Anil Kumar was present for cross-examination but the opposite-parties neither filed a reply to the charge sheet nor appeared before the Committee of Discipline to cross-examine and controvert the evidence of Anil Kumar.

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It is thus clear that a reasonable opportunity was given to the opposite-parties to put forward their case before the Committee of Discipline. In the circumstances it could not be said that the provisions of the Act had not been complied with or the statutory Tribunal had not acted in conformity with the fundamental principles of judicial procedure. The Committee of Discipline, exercising the delegated powers of the Vice-Chancellor, was competent to take a decision on the basis of the material before it. The opposite parties could have no grievance against the procedure adopted by the Committee of Discipline when they themselves failed to file any explanation or appear before that Committee. The exception provided in r 1 mentioned above is thus not attracted and the suits filed by the opposite-parties would not be maintainable.

A similar question for consideration came up before a Bench of this Court in *Vijay Bahadur Singh v. The Vice-Chancellor of University of Allahabad* (1). In this case the appellant was refused admission to one of the hostels of the University. He preferred an appeal to the Vice-Chancellor but that was dismissed. Thereafter he instituted a suit praying that the University authorities be directed to admit the appellant to the hostel. He also obtained an interim injunction directing the University authorities not to evict him from the hostel. Thereafter the University authorities instituted a writ petition in this Court challenging the competence of the civil court to entertain the suit. The writ petition was allowed and it was held that the civil court had no jurisdiction to entertain the suit and on this ground the proceedings in the suit were quashed. Relying on the second part of principle no.

(1) Spl Appeal No. 245 of 1972 decided on 8-5-1972.

2 in *Dhulabhai's* case (2) the Bench affirmed the view taken by the learned single Judge

Learned counsel for the opposite-parties contended that the University should have raised the question of jurisdiction when it filed objections to the applications for an interim injunction and as that was not done this Court should not interfere in the exercise of its extraordinary jurisdiction under Art 226 of the Constitution. It was also contended that against the order of the learned Munsif the University has preferred appeals which are pending and the question which is sought to be raised in the present petitions can also be raised and decided in the appeals. The University should have raised objections at the initial stage when it put in appearance in response to notices issued by the trial court. However, the failure to raise this plea at that stage would not be fatal to the maintainability of the present petitions. No useful purpose would be served by declining to interfere on this technical ground. The scheme of the Aligarh Muslim University Act bars the cognizance of the suit by the civil court and would be in the interest of all the parties concerned that the proceedings in the suits should be quashed at this initial stage when even the written statements have not been filed in the suits.

I accordingly allow these petitions and quash the proceedings in Suits Nos 137 and 438 of 1972 of the court of Munsif, Kori, Aligarh. The learned Munsif is directed not to proceed with the hearing of the aforesaid suits. In the circumstances of the case the parties are directed to bear their own costs.

*Petitions allowed*

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## APPELLATE CIVIL

Before Mr Justice S Chandra and Mr Justice  
N D Ojha

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March, 13

NEPAL SINGH

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U. P. Government Servants Conduct Rules, 1956, r 20—  
*Constitution of India, Art 311(2)—Police Sub-Inspector  
marrying again during the life time of his first wife—Sub-  
Inspector treated as a corrupt officer—Termination of ser-  
vice—Art 311(2) not attracted*

Where the dominant intention appears to have been to terminate the services of the appellant because he was found unsuitable to be retained in service, *held*, that the order does not seem to be founded directly or proximately on allegations that the appellant married two wives against Government Servants Conduct Rules. The impugned order cannot be characterised as imposing the punishment of dismissal or removal from service. The order on its terms is innocuous and does not cast any stigma. Art 311(2) is therefore not attracted.

Special Appeal No 9 of 1972 from the judgment dated 17th November, 1972 passed by H SWARUP, J in Civil Miscellaneous Writ Petition No 3092 of 1971

*B P Srivastava, K B Gang and R P Singh*, for the Appellant

*S C*, for the Respondent

S CHANDRA, J —The principal question raised in this appeal is whether the order terminating the temporary services of the appellant from the post of Sub Inspector of Police is in law an order of dismissal or removal from service so as to attract Art 311(2) of the Constitution

The appellant was employed as a temporary Sub-Inspector of Police. In 1969 he was posted at Shah-

jahanpur The Superintendent of Police, Sahjahanpur drew up disciplinary proceedings under s. 7 of the Police Act against the appellant on the charge that while he was posted at Pithoragarh he had in November, 1964, contracted a second marriage while his first wife was alive. This was done without prior permission of the Government in violation of r. 29 of the U. P. Government Servants Conduct Rules, 1956. The appellant denied the charge and filed a written statement. The Superintendent of Police recorded the evidence for the prosecution as well as the defence. At this stage the Deputy Inspector General of Police, Bareilly visited Shahjahanpur towards the beginning of February 1970. On a perusal of the file he found that the offence for which the appellant was charged was committed by him at Pithoragarh which was in a police range different than the one to which Shahjahanpur appertained and that without an order of transfer, the proceedings at Shahjahanpur were incompetent. On this view he, on 12th March, 1970, passed an order quashing the disciplinary proceedings.

On 8th March, 1970, the Inspector General of Police, Uttar Pradesh issued a Circular to the Superintendents of Police in the State requiring them to submit a list of the Sub-Inspectors, who fell in any of the following three categories

(1) Whose reputation and integrity is very low, and/or

(2) who are generally involved in scandals, like drinking, immorality etc which blackens the face of the U. P. Police, and/or

(3) everywhere they are a big problem because they encourage gambling, excise offences, brothels, criminals, etc

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The Superintendent of Police, Shahjahanpur drew up a list of such Sub-Inspectors and sent it to the Deputy Inspeceor General of Police, Bareilly on 4th April, 1970. The appellant's name was included in the list. In respect of the appellant the Superintendent of Police made the following note

"A corrupt officer, who is not straightforward  
 Married two wives against Government Servants  
 Conduct Rules Does not do his duty sincerely  
 Wherever he goes creates problem"

On receipt of this report the Deputy Inspector General of Police, Bareilly on 27th April, 1970 passed the impugned order terminating the appellant's service. On its face the order was innocuous. It did not refer to any of the matters mentioned in the report of the Superintendent of Police.

The appellant challenged the order of termination by way of a writ petition. It was pleaded that the order quashing the disciplinary proceedings was ante-dated and passed *mala fide* merely to validate the order of termination. It was also urged that the impugned order was passed by way of imposing a punishment of dismissal or removal from service and so it attracted Art 311(2) of the Constitution. The learned single Judge repelled both these submissions and dismissed the writ petition.

The appellant does not dispute the finding that disciplinary proceedings under s 7 of the Police Act could be conducted in the same police range in which the offence was committed. From the materials it is clear that the Deputy Inspector General of Police quashed the disciplinary proceedings on the ground that they were not competent in a different range. The appellant's allegation that the order was not passed on

12th March, 1970 but it was really passed subsequently and ante-dated or that it was passed *mala fide* to validate the order of termination has not been established by any cogent material. We have no hesitation in affirming the finding of the learned single Judge on this point

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For the appellant it was urged that formal departmental proceedings were commenced to enquire into the charge that the appellant had married again while his first wife was alive and was as such guilty of gross negligence and remissness in the discharge of the duties and unfitness for the same, yet although the disciplinary proceedings were quashed before any finding could be reached, the Superintendent of Police specifically mentioned in his report that the appellant had married two wives against the Government Servants Conduct Rules. It was urged that it was evident that the gravamen of the charge levelled against the appellant was the real reason for the termination of the appellant's services. The authorities intended to impose the punishment of dismissal or removal in the guise of a simple order of termination.

The learned Standing Counsel, on the other hand, contended that the Deputy Inspector General of Police passed the impugned order because on receipt of the evaluation of the appellant's work and performance it was found that he was not suitable to be retained in service. The order was not sought to be founded on any misconduct. Learned counsel for either party relied upon several decisions of the Supreme Court in support of their respective submissions.

The language of an order is not decisive upon its true character. In *P. L. Dhingra v Union of India* (1) it was held that a simple order of termination or

(1) AIR 1958 SC 86

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re. isic could become the imposition of punishment of removal or reversion if the order visits the servant with any penal consequence or affects or forfeits rights or benefits already earned or accrued to him. It was also held that it is true that misconduct, negligence or inefficiency or other disqualification may be the motive or inducing factor which induce the Government to take action, but if the termination of service is founded on the right flowing from the service rules, then, *prima facie*, the termination was not a punishment and so Art 311 is not attracted. But if the Government, nonetheless chooses to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art 311 must be complied with.

The question as to when misconduct, negligence etc form the motive or the inducing factor of the foundation for the termination was explained in *Jagdish Mitter v Union of India* (1). It was observed that the temporary servants or probationers are generally discharged because they are not found to be competent or suitable for the post they hold. Before discharging a temporary servant the authority may have to examine the question of the suitability of a servant to be continued. Such an enquiry is held only for deciding whether the servant should be continued or not. There is no element of punitive action in such an enquiry. Even if a formal enquiry is held into certain specified charges but while the enquiry is pending the authority takes the view that it may not be necessary or expedient to terminate the services of the servant by issuing an order of dismissal against him, the enquiry is stopped and an order of discharge simpliciter is pass-

(1) AIR 1964 SC 449



ed The discharge cannot, in law, be regarded as dismissal because the appointing authority was actuated by the motive that the said government servant did not deserve to be continued for some "alleged" misconduct.

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The decisions of the Supreme Court in *State of Punjab v Sukh Raj Bahadur* (1) and *A S Benjamin v Union of India* (2) were cases where disciplinary proceedings were launched on the basis of specified charges but the same were dropped without reaching any conclusion and a simple order of termination or reversion was passed. It was held that the order was valid.

In the cases of *State of Orissa v Ram Narain Das* (3) and *R C Lacy v State of Bihar* (4), the Supreme Court found that the enquiry was held with a view to evaluate the suitability of the officer and so the order was not by way of punishment.

In *State of Bihar v Gopin Kishore Prasad* (5) and *Madan Gopal v State of Punjab* (6) the Supreme Court found that regular enquiry into specified charges was held in order to take punitive action. The charges having been found proved at such an enquiry the order of dismissal or reversion being based on the findings was in the nature of punishment. The case of *Appar Apar Singh v The State of Punjab* (7) is also a case where an informal enquiry was held into specified charges of misconduct. The charges were found proved and the finding resulted in the order of reversion. It was held that the order was passed by way of punishment.

(1) AIR 1968 SC 1089

(2) Civil Appeal No. 1841 of 1966

(3) AIR 1961 SC 177

decided on 13-12-1966

(4) Civil Appeal No. 590 of 1962 decided on 23-10-1968

(5) AIR 1960 SC 689

(6) AIR 1968 SC 531

(7) 1970 (3) Supreme Court cases 888

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The cases of *Union of India v. R S Dhaba* (1) and *Champaklal Chimanlal Shah v The Union of India* (2) and *Jabir Singh Bedi v Union* (3) are cases where no enquiry was conducted but a recommendation to revert the officer was made because of a large number of complaints against the integrity of the officer and adverse reports from superior officers. It was held that the order was based upon an evaluation and assessment of the performance of the official in the officiating post and that the order was passed on the ground of unsuitability and that could not be deemed to be by way of punishment.

There are three decisions of the Supreme Court which require a little closer consideration. In *K H Phandia v State of Maharashtra* (4) the appellant was faced with certain charges of accepting money at the time of marriage of his daughter. The appellant denied the charges. The Secretary to the Government of Maharashtra, Agriculture and Forests Department told the appellant about the complaints against him in April 1962. The Minister of Civil Supplies in the month of April 1962 visited the appellant's office and said that there were complaints against him. The appellant requested a thorough enquiry in connection with such complaints. Subsequent to the visit of the Minister an Inspector of Police of the Anti-Corruption Branch took possession of several files of various fair price shops for scrutiny. At the time of the passing of the order the appellant protested that the same should be postponed till the completion of the investigation. The Government did not accede to the request of the appellant and reverted him. Later the police report exonerated him of the charges. Though the service record of Shri Phandia was good, yet be-

(1) 1969 (3) S C C 608

(2) C A 1272 of 1966 decided on 12-1-1968

(4) A I R 1971 S C 998

(3) 1964 (6) S C R 190

cause of this solitary incident he was reverted. The fact that the police enquiry exonerated the officer accentuated the intent of the Government to punish him because they were convinced that he was guilty. The order was held to be penal.

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In *State of Bihar v. Shiva Bhikshuk Mishra* (1) S. B. Mishra was officiating as a temporary Subedar Major. On 22nd September, 1950 he slapped his orderly. His Commanding Officer informed the Deputy Inspector General of Police of this incident intimating that on an enquiry he had found the incident to be true. The Deputy Inspector General of Police addressed a note to the Inspector General of Police that S. B. Misra was not suitable or fit to be promoted to the post of Subedar Major. As the present charge against him was serious an order of reversion would meet the case, because it was obvious that he was not likely to make either a suitable Subedar Major or Sergeant Major. The Supreme Court held that the order of reversion was directly and proximately founded on what the Commandant and the Deputy Inspector General said relating to the respondent's (S. B. Misra's) conduct generally and in particular with reference to the incident of assault by him on his orderly. The order was held to have been passed by way of punishment. It appeared from the note of the Deputy Inspector General of Police that though he mentioned reasons for S. B. Mishra's unsuitability but he recommended his reversion because of the serious incident of slapping the orderly. It seems to us that the Supreme Court felt that the dominant intent of the authority was to punish Shri Misra for the incident of slapping the orderly.

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The case of *Ram Gopal Chaturvedi v. State of Madhya Pradesh* (1) is in the same category. Shri Chaturvedi was functioning as Civil Judge in Madhya Pradesh, in 1964 when his services were terminated. It appeared that the High Court had received some complaints that Shri Chaturvedi was associating with a young girl against the wishes of her father. The Chief Justice of the High Court made an enquiry and admonished the appellant for this conduct. On his return the Chief Justice dictated a note indicating that there was substance in the complaint that the appellant was maintaining the girl and that his relations with her were not innocent. The note then stated

"Shri Chaturvedi did not enjoy good reputation at Morena and Kolaras where he was posted before his posting at Gwalior. Shri Bajpai, District Judge, Gwalior also informed me that Shri Chaturvedi was not honest and that in collaboration with the Traffic Inspector he has taken money from accused persons in many cases under the Motor Vehicles Act."

No charge-sheet was served against the appellant nor was any departmental inquiry held against him. On 10th March, 1964 the Madhya Pradesh High Court passed a resolution that the State Government should terminate the appellant's services. The State Government accepted this recommendation and passed a simple order of termination. The Supreme Court held that the High Court did not find the appellant fit to be retained in service and the Government took the same view. The enquiry was held with a view to see whether he should be retained in service. In this case the order of termination was based upon his conduct generally but with reference to a particular inci

dent as well. It appears to us that the only fact which distinguishes this case from the decision in *Shiva Bhikshuk Mishra's* case (1) is that in *Chaturvedi's* case (2) the Court felt that the authority's dominant intention was that the officer was unsuitable and the order was not based primarily upon any specific misconduct.

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Our attention was also invited to the cases of *Jagdish Prasad Shastri v State of U P* (3) and *R K Bhatt v Union of India* (4). In both these cases the Supreme Court did not decide any thing. After making some general observations the cases were remanded to the High Court for evaluation of facts. They are not helpful.

The decision of the Supreme Court in *State of Mysore v P R Kulkarni* (5) shows that if an order is based upon collateral facts or irrelevant considerations it is liable to be struck down as arbitrary. A conspectus of these authorities shows that a simple order of termination or reversion would amount to punishment or reduction in rank if—

(1) the Government servant holds a permanent post in a substantive capacity, because in that case a simple order of termination or reversion necessarily involves casting a stigma by removing him from a post which he has a right to hold.

(2) Where the order expressly uses words which cast a stigma on the character or conduct of the officer; like 'corrupt, officer' *State of Bihar v Gopi Krishore Prasad* (6), 'found undesirable' *Jagdish Mitter v. Union of India* (7), 'outlived utility' *State of Uttar Pradesh v Madan Mohan Nagar* (8). But terms like 'for general unsuitability'

(1) AIR 1971 SC 1011.

(3) AIR 1971 SC 121.

(5) AIR 1972 SC 217.

(7) AIR 1961 SC 119.

(2) AIR 1970 SC 158.

(4) 1970 (2) I L J 587.

(6) AIR 1960 SC 689.

(8) AIR 1967 SC 1260.

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*Dalip Singh v State of Punjab* (1) or 'in public interest' (*T. G. Shivacharana v State of Mysore*) (2), do not cost any stigma.

(3) If the order is directly based upon findings of guilty of misconduct etc reached at an enquiry either formal or informal, or where the order is based upon the Government's conviction that the officer was guilty of some specific misconduct, the order is deemed to have been passed by way of punishment

(4) Where the order is based on specific allegations of misconduct as well as general evaluation or assessment of his performance the predominant intention is to be seen. If the dominant intent was to punish because of the misconduct the order will be a punishment

(5) If the order is based on a general assessment of the officer's performance in order to find out his suitability to hold the post, the order does not involve any punishment irrespective of the fact whether an enquiry was held for this purpose or the assessment was made on the existing record of service.

In the present case the Inspector General had issued a Circular requiring the Superintendents of Police to submit a list of Sub-Inspectors who fell in any of the three categories

(1) Whose reputation and integrity is very low, and/or

(2) who are generally involved in scandals, like drinking, immorality etc which blackens the face of the U P Police, and/or

(1) AIR 1960 SC 1805

(2) AIR 1965 SC 289

(3) everywhere they are a big problem because they encourage gambling, excise offences, brothels, criminals, etc.

The report of the Superintendent of Police against the appellant was.

"A corrupt officer, who is not straightforward. Married two wives against Government servants Conduct Rules Does not do his duty sincerely Wherever he goes creates problem."

The first sentence (corrupt officer) brought the appellant within the first category, namely, his integrity was very low. The third clause covered the third category, namely, that he was a problem. The second clause that he married two wives against the Government Servants Conduct Rules did not bring him in any of the three categories. Marrying twice over was not an offence. The gravamen of the charge was that he did this without prior permission of the Government. The charge was technical, and not one which involved scandals, like drinking, immorality etc which blackens the face of the U P Police as mentioned in the second category of the Circular. In our opinion the dominant intention appears to have been to terminate the services of the appellant because he was found unsuitable to be retained in service. The order does not seem to be founded directly or proximately on the allegation that the appellant married two wives against Government Servants Conduct Rules. In our opinion the impugned order cannot be characterised as imposing the punishment of dismissal or removal from service. The order on its terms is innocuous. It does not cast any stigma.

In the result the appeal fails and is accordingly dismissed with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL

Before Mr Justice G C Mathur and Mr Justice  
H Swarup

1978  
March, 24

STATE OF U P AND ANOTHER

APPELLANTS,

v

DHAN SINGH AND OTHERS

RESPONDENTS

**U. P. Imposition of Ceiling on Land Holdings Act, 1960,  
s 3-A—Child in womb on the date of enforcement of the  
Act—Born after the commencement of the Act—Cannot be  
taken into account for determining the family**

The doctrine that a Hindu undivided family comes into existence from the date a son is conceived is not of universal application and cannot be invoked in determining ceiling area of the tenure-holder under the Act

Normally, an unborn child even if in the womb, is not taken or counted as a member of the family

Special Appeal No 1018 of 1967 from the judgment of S CHANDRA, J in Civil Miscellaneous Writ No 147 of 1967, decided on 16th May, 1967

S C, for the Appellants

K C Agarwal and K B L Gaur, for the Respondents

G C MATHUR, J —Dhan Singh respondent no 1, was the tenure-holder of a huge area of land. A notice under s 10 of the U P Imposition of Ceiling on Land Holdings Act, 1960, was served upon him. He filed objections claiming that his family consisted of seven members. He also claimed certain exemptions. By the time the objections came to be decided his family had increased to nine members and he claimed that the ceiling area should be calculated on the basis of nine members in his family. The Prescribed Authority accepted his contention and calculated the ceiling area at 64 acres, but in calculating the surplus area the Prescribed Authority committed some error. Dhan



Singh preferred an appeal for correcting the error in the calculation of the surplus area. In the appeal it was urged on behalf of the State Government that the child born subsequent to the coming into force of the Act could not be taken into account in calculating the members of the family. This contention was accepted by the Appellate Authority and it held that on the date the Act came into force, which is the relevant date, the family consisted of only seven members and was, therefore, entitled to a ceiling area of 56 acres only. It further held that the surplus area calculated on this basis came to something more than what had been declared by the Prescribed Authority and, therefore, Dhan Singh was not really aggrieved by the order of the Prescribed Authority. It, accordingly, dismissed the appeal. Thereupon a writ petition was filed before this Court.

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It appears that out of the two children born after the coming into force of the Act, one was a son who was in embryo on the date the Act came into force. It was urged before the learned single Judge that this son should be deemed to have been in existence on the date the Act came into force and should be taken into account in determining the family. The learned single Judge accepted this contention and held that a child in the womb was a child in existence on the date the Act came into force. He, accordingly, held that the family consisted of eight members and was entitled to a ceiling area of 64 acres. On this basis the surplus area was found to have been wrongly calculated and the learned single Judge remanded the case to the Appellate Authority for correction of the mistake. The State Government has now preferred this appeal against the judgment of the learned single Judge.

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The only question which arises for determination in this appeal is whether a child who was born after the Act came into force, but who was in embryo on that date, can be treated to be a child in existence on the date. The learned Standing Counsel has relied upon the decision of a Division Bench of this Court in *State v District Judge (1)*. The facts of this case are identical to the facts of the case before us. In this case the family of the tenure-holder consisted of five members, but a son was born in February 1961 increasing the number to six. It was held by the Division Bench that the relevant date for determining the ceiling area was the date of the enforcement of the Act (3rd January, 1961) and, therefore, a son born after this date could not be taken into account in determining the number of the members of the family. Since the son in this case was born in February 1961, it is obvious that he was in embryo on the date the Act came into force and still the Division Bench held that he could not be treated as a member of the family for purposes of calculating the ceiling area. Learned Counsel for the contesting respondents has contended that the specific question whether a child in embryo on the date the Act came into force should be deemed to be a child in existence on that date was not raised or decided in this case.

How the ceiling area is to be calculated is set down in s 4 of the Act. The relevant part of sub-s (2) of s 4 with which we are concerned reads thus:

"2. (a) The ceiling area of a tenure-holder shall be forty acres of Fair Quality Land

(b) Where the tenure-holder has, or consists of a family having more than five members, the ceiling area of such tenure-holder shall be the area men-

tioned in cl (a) together with eight acres of Fair Quality Land for every additional member of the family, subject to a maximum of twenty-four such acres."

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Cl (c) of s 3 defines a family and enumerates the relations who are to be included in the family Sub-cl (iii) refers to "son and son's son, as long as they are unseparated from the holder" Therefore, what is to be seen is as to how many members were there in the family of the tenure-holder Dhan Singh on 31d January, 1961 Members have to belong to one of the classes enumerated in the definition of the family The question is whether the son who was in embryo on 31d January, 1961 can also be deemed to have been in existence on that date and to constitute a member of the family The doctrine deeming a son in embryo to be in existence on a date prior to the date of his actual birth has been applied to rights of inheritance and succession and to rights incidental to these rights such as the right to partition and the right to challenge alienations made by the Karta of a joint Hindu family In *Ram Dayal v Bhim Sen* (1) this doctrine was applied to succession under s 35 of the U. P. Tenancy Act It was held that a daughter's son who was in womb at the death of his maternal grandfather or his widow would be deemed to have been in existence at the time of their death and would inherit the latter's tenancy The Bench which decided this case observed that according to all civilised systems of jurisprudence a child in embryo at the death of the holder of a proprietary interest, if born alive after his death, is deemed to be living at his death There are decisions, to which it is unnecessary to make a reference, holding that a Hindu son born subsequently is competent to contest alienations made by the

(1) 1968 A.L.J 1142

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father when the son was in his mother's womb. But the doctrine is not of general or universal application. In *Guramma v Malappa* (1) the Supreme Court held that the doctrine could not be applied to adoption. It was held that the existence of a son in embryo, of a co-widow does not invalidate the adoption made by the widow and that the son in embryo, even though born alive subsequently, could not be deemed to have been in existence at the time of the adoption. In *T S Srinivasan v Commissioner, Income-tax* (2) the Supreme Court held that the doctrine could not be applied to tax matters. It was held that the doctrine that a Hindu undivided family comes into existence from the date a son is conceived is not of universal application and it is applied mainly for the purpose of determining rights to property and safeguarding such rights of the son. The doctrine has been applied in cases where such a son would acquire some right of property if he were deemed to have been in existence on some date prior to the date of his actual birth. In the present case since Dhan Singh is the tenant holder, his son who was conceived on the date the Act came into force and was born alive subsequently would not acquire any right in the holdings even if he were deemed to have been in existence on 3rd January, 1961. The holding continues to be that of Dhan Singh. The only effect of deeming this son to have been in existence on 3rd January, 1961 would be that Dhan Singh would be entitled to retain a little more land in his ceiling area. But the application of the doctrine would not confer any direct right or benefit on the son. Therefore, the non-application of the doctrine and non-recognition of the existence of the son on 3rd January, 1961 will not affect any right of the son. The doctrine cannot be invoked or applied merely to confer some benefit on

(1) AIR 1961 SC 610

(2) AIR 1966 SC 931

the father. We have not been referred to any case where the doctrine has been applied to cases where rights of inheritance and succession and rights incidental to these rights are not involved. We are of opinion that the doctrine cannot be invoked in determining ceiling area of a tenure-holder under the Act. This is also impliedly the decision of the Division Bench of this Court which decided the case *State v. District Judge* (1)

The provisions of the Act also show that the doctrine cannot be applied to the Act. The relevant words of cl. (b) of sub-s (2) of s 4 are—

“Where the tenure-holder has a family having more than five members . . . .”

The language indicates that the family and its members must be actually in existence on the relevant date. It does not contemplate a notional existence either of the family or of its members. Normally, an unborn child, even if in the womb, is not taken or counted as a member of the family. Cl. (c) of s. 3 defines ‘Family’ and enumerates five classes of relations who are to be included in the family. The third and the fifth classes are—

“(iii) son and son’s son, as long as they are unseparated from the holder ,

(v) daughter and unseparated son’s daughter as long as they are unmarried”

The language used there is not appropriate to a person not actually in existence on the relevant date. The words ‘separated’ or ‘unseparated’ and ‘married’ or ‘unmarried’ can only be used for persons in actual existence and not for persons notionally in existence. Cl (c) further provides that the five classes of relations enumerated therein are to be included in the family provided they are not tenure-holders in their own

(1) 1961 ALL J 558

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separate rights. This proviso also indicates that the relations talked of in cl (c) of s 3 must be in existence on the relevant date and should not be tenure-holders in their own separate rights. No question of being a tenure-holder in his own right can arise in respect of a person not actually in existence.

Since, in our opinion, the son conceived before the date of the enforcement of the Act, but born afterwards cannot be deemed to have been in existence on the date of the enforcement of the Act, the family of Dhan Singh, the tenure-holder, consisted only of seven members on the relevant date. That being so, he was entitled to a ceiling area of 56 acres only. On that basis the surplus area which has been determined cannot be said to be in excess of what was legally the surplus area. If there was any error in determining the surplus area, it was in favour of Dhan Singh, the tenure-holder. The District Judge was, therefore, right in dismissing the appeal. His order did not call for any interference in the writ petition.

The appeal is, accordingly, allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed. The parties will bear their own costs of the appeal as well as of the writ petition.

*Appeal allowed*

## CRIMINAL REVISION

*Before Mr. Justice K B Sinha\**

1973  
March, 29  
DFSH RAJ  
v  
STATE  
OPPOSITE-PARTY  
Code of Criminal Procedure, 1898, s 369 --Judgment--  
*Finality of—Principle does not apply to interim or interlocutory orders*

\*While sitting at Lucknow.

S 369 only precludes alteration of final judgment and keeps intact the power of a court to pass different orders from stage to stage in so far as an interim or interlocutory matter is concerned

1973  
DASH RAJ  
v  
STATE

*Dr Hori Ram Singh v. Emperor (1) and Mirza Mohd. Afzal Beg v State of Jammu and Kashmir (2) relied on.*

—, 1898, s 423(1)(a)—*Appeal against acquittal—Acquittal set aside and case remanded for retrial—Retrial, if, means “de novo trial”—Word “retried”—Meaning of*

A retrial as a result of an order of remand, may be from the stage of illegality and not necessary from the beginning. The word “retried” occurring in cl (a) is of wide amplitude, and gives a discretion to the appellate court either to order a *de novo* trial, if the exigency of the situation so demands, or from the particular stage where the illegality was committed, or serious irregularity materially prejudicing an accused occurred, and it does not fetter the court’s discretion in any manner. The object is to subserve the ends of justice and how that object will be achieved, will be dependent upon the peculiarity of each case.

The stage from which it should start will invariably be indicated in the appellate judgment itself.

Criminal Revision No 214 to 218 of 1970.

R. C. Sinha, for Applicant

J. B. Srivastava, for State

K. B. SRIVASTAVA, J. —The petitioners in these five revisions were prosecuted separately for applying false trade marks, trade descriptions and for selling goods to which a false trade mark or false trade descriptions had been applied, that is to say, for offences punishable under ss 78 and 79 of the Trade and Merchandise Marks Act, 1958. They pleaded that their prosecution were barred by limitation under s 92 of that Act. The learned Additional City Magistrate, Lucknow, who held the trials accepted that plea and consequently ordered their acquittal. The State filed Criminal Appeals nos 60, 61, 62, 63 and 64 of 1967 against these orders of acquittal. The said five appeals were allowed by this Court and the cases were remanded for decision accord-

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DESH RAJ  
v  
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ing to law While doing so, this Court made the following observation

'I am, therefore, of the opinion that in any view of the matter the prosecution was not barred by limitation and the Magistrate was in error in coming to a contrary conclusion. In the concluding paragraph of his judgment, the Magistrate had further observed that no independent witness had been examined by the prosecution to show that any customer was ever deceived and confused while making purchase of the genuine 'Shiv 151 Special' soap and the soap purchased by him was counterfeit. Here the Magistrate entered into wholly irrelevant consideration. Without entering into the merits of the evidence regarding discovery whether the offence charged had been made out against the respondents, he held that the case was not proved against the accused and that they were entitled to acquittal. It is clear that the Magistrate did not discuss the evidence nor based his conclusion regarding proof of the charge framed against the respondents.

'In view of my conclusion that there was no bar of limitation and also in view of the above circumstances, the case appears to be a fit one for remand to the Magistrate for its decision according to law. Accordingly the appeals are allowed and the order of acquittal passed by the Magistrate is set aside. The record of the case will be sent to the District Magistrate who shall transfer the case for disposal according to law to any competent Magistrate."

After the receipt of the five cases on remand the successor Additional City Magistrate passed an order on 26th December, 1969 for the cases to be listed on 8th



January, 1970 for the recording of the statements of the petitioners in their separate cases and for the framing of the charges. The cases did not come up for disposal on 8th January but instead on 20th January on which latter date, the Public Prosecutor made an application for the decision of the cases on the basis of the evidence already on the record and on the basis of such other evidence, as the prosecution might like to adduce. This application was opposed by the petitioners. The learned Magistrate heard arguments and ordered on 19th February, 1970 that there was no occasion for recording the statements of the petitioners afresh or for framing of fresh charges and fixed 21st February for arguments.

Feeling aggrieved by that order, the petitioners filed five revisions before the Sessions Judge, Lucknow, praying for making references to this Court for quashing that order. However, the Sessions Judge dismissed these revisions, giving rise to these revisions in this Court.

The first contention of the learned counsel for the petitioners is that it is a universal principle of law that, when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, *functus officio* and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside. This principle, he enunciated by resort to the provisions contained in s. 369, Code of Criminal Procedure, and argued that once the learned Additional City Magistrate had taken a decision on 26th December, 1969, that he would record the statements of the petitioners and framed charges, finality attached to this order, and he had no power left to revise, or review, or substitute this order by another one which he subsequently passed on 20th January, 1970 impliedly reversing the previous order and listing the cases for arguments only.

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MRSH RAJ  
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Srivastava, J

The argument has proceeded on wrong premises. Finality attaches to a 'judgment' under s 369. A 'judgment' must be clearly distinguished from an interlocutory order. This was so held by the Federal Court in *Dr Hari Ram Singh v Emperor* (1) wherein SULAIMAN, J, held as follows

"In England judgment is equivalent to a judgment of conviction or acquittal and is distinct from other orders in a criminal case. This will appear from an examination of para 260-4 in Vol 9, Halsbury's Laws of England (Hailsham Edition). In the Indian Code of Criminal Procedure, judgment is not defined, but various sections suggest what it means. Thus, judgment in the Code means judgment of conviction or acquittal."

See also *Shaukat Ali Khan v The State of Punjab* (2) which lays down that an order refusing exemption to an accused from appearance in Court is not a judgment and can be recalled without involving any considerations relating to review of judgment in criminal cases, and *Mirza Mohd Afzal Beg v State of Jammu and Kashmir* (3), which holds that it is not valid to contend that the Magistrate is absolutely bound by an order on an interlocutory matter and has no right to pass a different order unless his earlier order was set aside by a superior court in appropriate proceedings. The principle applicable to judgment does not apply to interlocutory orders and a Magistrate is entitled to pass a different order at a latter stage. The view propounded by the Federal Court is binding on this Court. Besides, it is obvious that s 369 only precludes alteration of a final judgment and keeps intact the power of a Court to pass different orders from stage to stage in so far as an interim or interlocutory matter is concerned.

(1) AIR 1939 F C 48 and 48 (2) AIR 1960 All 565  
 (3) AIR 1960 J and K 1

Bail may be refused once and granted a second time. A charge may be framed and modified. A warrant may be issued for arrest and may be recalled before it is executed. There is no use multiplying illustrations. Indeed, were it not so, the smooth functioning of a criminal court would be partially, if not completely, retarded.

The next contention of the learned counsel for the petitioners is that once a case is remanded for retrial, it can only mean a *de novo* trial and not a trial from an intermediate stage and, therefore, the learned Magistrate erred in ordering that he would hear only arguments on the basis of the material on the record and write out a fresh judgment. He has placed reliance for that on *Pot Ram v Emperor* (1). In that case, it was conceded that there was no power to order a retrial with the condition that the evidence already on record should be taken into consideration. It was further conceded that if there is to be a retrial the accused is entitled to demand that there shall be a *de novo* trial. There was, therefore, virtually no decision as the judgment proceeded on the basis of the concession made at the bar. The law to the contrary has been laid down in *Motan Khan v Emperor* (2), *Dibakanta Chatterjee v Gour Gopal Mukherjee* (3), *Vinimal Seoomal v Emperor* (4), *Nirmal Prasad Banua v The State* (5), *Dara Singh v The State* (6), *State v. Ranganagouda* (7) and *Mariyam v State of Kerala* (8). The majority of the High Courts, therefore, are of the view that a retrial as a result of an order of remand, may be from the stage of illegality and not necessarily from the very beginning. S. 123(1)(a), Cr. P. C. authorises the appellate Court in an appeal from an order of acquittal, to reverse such order and direct that further inquiry be made, or that

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(1) 86 Cr. L. J. 740  
(3) A.I.R. 1923 Cal. 727  
(5) A.I.R. 1952 Assam 2  
(7) A.I.R. 1961 Mys. 60

(2) A.I.R. 1927 Sind. 175  
(4) A.I.R. 1911 Sind. 144  
(6) A.I.R. 1952 Punn. 214 (F.B.)  
(8) 1961 (2) Cr. L. J. 97.

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the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. The word "retried" occurring in cl (a) is of wide amplitude, and gives a discretion to the appellate Court either to order a *de novo* trial, if the exigency of the situation so demands, or from the particular stage where the illegality was committed, or serious irregularity materially prejudicing an accused occurred, and it does not fetter the Court's discretion in any manner. The object is to subserve the ends of justice and how that object will be achieved, will be dependent upon the peculiarity of each case. That being so, there is no substance in this contention also of the learned counsel that the retrial must commence from the very start. The stage from which it should start will invariably be indicated in the appellate judgment itself. It is true that the judgment of this Court is silent about it. However, the trend appears in clear pictures. Only two points were argued, namely, that the cases were not barred by limitation and that, on the evidence on record, a conviction should have been recorded. This Court decided the first point and held that the cases were not barred by limitation. With regard to the second point, it observed that the learned Magistrate had not discussed the evidence threadbare in arriving at the conclusion that no offence had been committed and it is for the purpose that the cases were remanded. I am, therefore, clear in my mind that the intention was that the learned Magistrate should consider the entire evidence and write out his judgment on that basis.

Altogether, therefore, these revisions have no substance and are dismissed. The stay orders earlier passed are vacated. The record shall be sent back to the Magistrate concerned so that the trials are not further delayed.

*Revisions dismissed*

## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr Justice*

*N D Ojha*

SARFARAZ AHMAD KHAN

APPELLANT,

1973

April, 4.

## ELECTION TRIBUNAL AND OTHERS RESPONDENTS.

*U. P. Town Areas Act, 1914, s 6-K and Rules, r. 48—Elected Chairman of Town Area dismissed employee from Police Force—No evidence that he was debarred from employment—No disqualification for being chosen as Chairman, Town Area*

There seems to be no manner of doubt that the language used in r. 48-C is comprehensive enough to include even such candidates who are disqualified under s 6-F

The question as to whether the appellant had been dismissed in such a manner that he was not desired to be re-employed elsewhere cannot be made the subject-matter of surmises. It has to be proved as a fact that he was not a person who had been dismissed with the desire not to be re-employed elsewhere

*Held*, that as the necessary ingredients of s. 6-K of the Act were not proved the Election Tribunal committed a manifest error of law in taking the view that the appellant was disqualified for being elected as Chairman

Special Appeal No. 34 of 1973 against the judgment and order of R. L. GUPTA, J in Civil Miscellaneous Writ No 5973 of 1972, decided on 20th December, 1972

4 H.C. (I.L.R.)—1973—10

1973 S J Handen for the Appellant  
 SARFAZ AHMAD KHAN v. ELECTION TRIBUNAL S K Dhaon, S Afsar Ali, N C Upadhyaya and S. C. for the Respondents

N D OJHA, J —The appellant, Sarfaraz Ahmad Khan filed a writ petition challenging an order of the Election Tribunal whereby his election as Chairman, Town Area, Bugtasi, district Bulandshahr, was set aside. For the said office of Chairman there were three candidates. The appellant Sarfaraz Ahmad Khan, and respondents nos 2 and 3, Mohammad Abdul Salam Khan and Ausaf Ahmad Khan. The appellant secured 1,265 votes while the second and the third respondents secured 780 and 703 votes respectively. The appellant was declared elected. Thereafter Mohammad Abdul Salam Khan, respondent no 2, filed an election petition. The election petition was allowed on the ground that the appellant was disqualified from being chosen as Chairman in view of the provisions of s 6-K of the Town Areas Act inasmuch as he had been dismissed from service under the Delhi Police Force. The Election Tribunal further directed respondent no 2 to be declared elected. The writ petition filed by the appellant was dismissed. The learned single Judge also set aside the order of the Tribunal directing respondent no 2 to be declared elected and directed the Tribunal to decide the question as to whether respondent no 2, was entitled to be declared elected or not in the light of the observations made by him in the judgment. Against this judgment two appeals have been filed. Sarfaraz Ahmad Khan filed Special Appeal No 31 of 1973 while Mohd Abdul Salam Khan filed Special Appeal No 66 of 1973.

Learned counsel for Sarfaraz Ahmad Khan has made two submissions in support of his appeal. Firstly, that

under r. 48-C the Election Tribunal had jurisdiction to set aside the election of a candidate elected as a Chairman only on the ground that he was not qualified to be nominated as a candidate. It was urged that the words "not qualified to be nominated as a candidate" do not include the person who was disqualified for being chosen. According to him the question as to whether any candidate was fit for being chosen as a candidate exclusively fell within the jurisdiction of the Returning Officer and it could not be made the subject-matter of an election petition. Secondly, that the appellant could not be said to be a dismissed servant within the meaning of s. 6-K of the Act. With regard to the first submission it is to be pointed out that s. 6-K of the Act which provides for the disqualification in this regard is in these terms:

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"A person, notwithstanding that he is otherwise qualified, shall be disqualified for being chosen as and for being, a member or Chairman of a Committee if he—

(a) is a dismissed servant of a local authority, the State or Central Government and is debarred from re-employment therein, or

(b) . . . . . "

Learned counsel for the appellant placed reliance upon s. 6-J and s. 8 A(1) of the Act. The relevant portion of s. 6-J provides that:

"A person shall not be qualified to be chosen to fill a seat on a Committee, unless—

(a) . . . . .

(b) in the case of any other seat, he is an elector for any ward in the Town Area"

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S 8A(1) provides

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"The Chairman of every Committee shall be an elector of the town area "

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According to learned counsel for the purposes of determining whether the appellant was qualified for being elected as a Chairman the only thing required to be looked into was whether the appellant was an elector for any ward in the Town Area or not and this was the limited question which could have been gone into by the Election Tribunal. He tried to draw a distinction in the phraseology of s 22(2) and s 48-C. R 22(2) provides

"The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds, namely—

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified to be chosen to fill the seat under the Act or is disqualified for being chosen to fill the seat under the Act or

(b) . "

R 48-C on the other hand uses only the words "was not qualified to be nominated as a candidate". On the distinction of the phraseology between the two rules it was submitted that whereas the Returning Officer was given the authority to reject a nomination paper on



both these grounds, namely, that he was not qualified to be chosen and also on the ground that he was disqualified for being chosen, whereas r 48 does not provide for the latter contingency. We are, however, not impressed by this argument. The rules are framed for carrying out the intention of the Act. The relevant portion of s 6-K as quoted above specifically provides for a disqualification for being chosen or for being a member of Chanman. In other words if a candidate comes within the purview of s 6-K he is not entitled to be chosen or for being a member of the Committee. It is in this context that the rules have to be interpreted. Viewed from this angle there seems to be no manner of doubt that the language used in r. 48-C is comprehensive enough to include even such candidates who are disqualified under s 6-K in this view of the matter the first submission made by the learned counsel has no substance.

In support of his second submission learned counsel again placed reliance on s 6-K. It was urged that upon a reading of the said section the disqualification of a person who was dismissed servant of a local authority or the State or Central Government would operate only if he was debarred from re-employment therein. According to the learned counsel simply because the appellant had been dismissed from Delhi Police Force it cannot be said that he was debarred from re-employment in any service under the Delhi State. In this connection reliance was placed on s 7 of the Police Act. The relevant portion of s 7 reads:

"Subject to the provisions of Art 311 of the Constitution, and to such rules as the State Government may from time to time make under this Act,

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the Inspector General, Deputy Inspectors General, Assistant Inspector General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty or unfit for the same ;

or may award any one or more of the following punishments

(d) removal from any office of distinction or special emolument "

S. 7 of the Police Act does not make any distinction between an order of dismissal or removal except in the cases of removal from any office of distinction or special emolument. In this view of the matter it is clear that the word 'dismiss' used in s. 7 includes removal also. Every case of dismissal, therefore, would not be one where the dismissed employee would be debarred from being re-employed. It would have to be determined whether his dismissal was a dismissal as such within the meaning of Art. 311 of the Constitution or it was a case of removal. R. 16(2)(iii) of the Punjab Police Rules provides -

"When a police officer is convicted judicially and dismissed, or dismissed as a result of a departmental enquiry, in consequence of corrupt practices, the conviction and dismissal and its cause shall be published in the *Police Gazette*. In other cases of dismissal, when it is desired to ensure that the officer dismissed shall not be re-employed elsewhere, a full descriptive roll, with particulars of the punishments shall be sent for publication in the *Police Gazette*."

Subsequent portion of the aforesaid rule makes it clear that in cases of dismissal other than mentioned in the earlier part when it is desired to ensure that the officer dismissed shall not be re-employed elsewhere, a full descriptive roll has to be sent for publication in the *Police Gazette*. It implies that there can be cases where even though an order of dismissal of a Government servant was passed yet it was not desired to ensure that he may not be re-employed elsewhere. The question as to whether the appellant had been dismissed in such a manner that he was not desired to be re-employed elsewhere cannot be made the subject-matter of surmises. It has to be proved as a fact that he was a person who had been dismissed with the desire not to be re-employed elsewhere.

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Learned counsel for the respondent placed reliance on r. 16(2)(1) of the said rules which reads

"Dismissal shall be awarded only for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service. In making such an award, regard shall be had to length of service of the officer and his claim to pension."

On the basis of this rule it was urged that an order of dismissal could be passed only if the officer had been found unfit for police service. That may be true, but that is not enough to attract the provisions of s. 6-K of the Act which requires that the dismissal should be such which debars the person dismissed from re-employment in any service of the State and not only as a police officer. R. 16(2)(1), therefore, can assist the respondents only to this extent that from the order of the dismissal it may be taken that the appellant was debar-

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red from being re-employed in the Police Force having been found to be unfit for the said service, but nonetheless it cannot be deduced from the fact of dismissal of the appellant that he was debarred from being re-employed in any capacity in the service of the State

Learned counsel for the appellant has urged that there was no evidence before the Election Tribunal to indicate as to whether the appellant had been debarred from being re-employed in any service in the State Government. None has been brought to our notice. In this view of the matter we are of opinion that the necessary ingredients of s 6-K of the Act were not proved and the Election Tribunal committed a manifest error of law in taking the view that the appellant was disqualified for being elected as Chairman. In the circumstances, it is not necessary to decide the Special Appeal No 66 of 1973 on merits because if the order passed in the election petition is quashed the said appeal automatically becomes infructuous.

In the result Special Appeal No 34 of 1973, filed by Sarfaraz Ahmad Khan is allowed, the judgment of the learned single Judge is set aside, the writ petition is allowed, the order of the Election Tribunal is quashed and the election petition is dismissed. Special Appeal No 66 of 1973 is dismissed. The appellant in Special Appeal No 34 of 1973 will be entitled to his costs but there will be no order as to costs in Special Appeal No 66 of 1973.

*Ordered accordingly*

## APPELLATE CIVIL

Before Mr Justice S Chandra and Mr Justice  
N D Ojha

ANEG SINGH AND OTHERS

APPELLANTS,

1978  
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v

RAM NATH AND OTHERS

RESPONDENTS

*Code of Criminal Procedure, 1898, s 145—U P Zamindari Abolition and Land Reforms Act, 1950, s 209—Possession of the Receiver enures for the benefit of the real owner—Trespasser cannot take that period as his own for the purposes of limitation*

The possession of the court or of a Receiver under s 145, Cr P C enures for the benefit of the real owner. If it is found that the trespasser was actually in possession on the date of the preliminary order, then the effect of the Court's possession thereafter is to effect an interruption in his possession. The trespasser cannot count the period of possession of the Court or the Receiver as his own possession for the purposes of limitation for a suit, for ejectment or possession.

*Sarat Chandra Maity v Bibhawati Devi (1), Ittyamma Mathai v Varkey Verkey (2)* relied on

Special Appeal no 537 of 1970 against the judgment and Order of W BROOMF, J in Civil Miscellaneous Writ no 4089 of 1967 decided on 30th April, 1970

B D Tripathi, for the Appellant

G Gharama, R Pandey and S C, for the Respondent

S CHANDRA, J —The question is whether the claim of the appellants for the ejectment of the respondents under s 209 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act was barred by limitation, on the date when notification under s 4 of the U P Consolidation of Holdings Act was issued *qua* the land in dispute.

(1) 66 I C 438.

(2) AIR 1964 SC 907

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It appears that the land in dispute was attached under s 145, Cr P C on 8th May, 1958, by a preliminary order passed by a Magistrate. The dispute was referred for decision to the Civil Court under s 146, Cr. P C. The Civil Court gave a finding that the respondents were in possession on the relevant date. Thereupon the possession of the plots was released in favour of the respondents on 29th January, 1960. The notification under s 4 of the Consolidation of Holdings Act was published somewhere in 1965. Objections as to title were raised by the parties in consolidation proceedings. The Deputy Director ultimately held that the adverse possession of the respondents would commence only from 29th January, 1960 when possession was delivered to them by the criminal court. The possession of the criminal court between 8th May, 1958 and 29th January, 1960 will not enure to the benefit of the respondents. On this view it was held that the six years period of limitation for a suit under s 209 did not expire by the time the notification under the Consolidation of Holdings Act was issued and, therefore, the title of the appellants did not extinguish.

Aggrieved, the respondents filed a writ petition in this Court. A learned single Judge held that as the land was in the custody of the criminal court between 8th May, 1958 and 29th January, 1960, the court must be deemed to have been holding possession on behalf of the person eventually found to be entitled to possession. On this view, coupled with the finding that the respondents had been in possession even from before the date of the preliminary order, it was held that they will be deemed to have remained in possession without any break and so they completed the requisite period of possession by 30th June, 1964 i.e. before the consolidation operations commenced and the title of the ap-

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Before Mr Justice S Chandra and Mr Justice  
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RAM NATH AND OTHERS

RESPONDENTS

Code of Criminal Procedure, 1898, s 145—U P Zamindari  
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*B D Tripathi*, for the Appellant

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pute

(1) 66 I C 488

(2) AIR 1964 SC 907

4 H C (I L R)—1973—11

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 J

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Aggrieved, the respondents filed a writ petition in this Court. A learned single Judge held that as the land was in the custody of the criminal court between 8th May, 1958 and 29th January, 1960, the court must be deemed to have been holding possession on behalf of the person eventually found to be entitled to possession. On this view, coupled with the finding that the respondents had been in possession even from before the date of the preliminary order, it was held that they will be deemed to have remained in possession without any break and so they completed the requisite period of possession by 30th June, 1964 i.e. before the consolidation operations commenced and the title of the ap-



pellants extinguished On this view the writ petition was allowed and the Deputy Director's order was quashed

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S Chandra,  
J

For the appellants it was urged that the possession of the criminal court shall enure for the benefit of the true owner In support reliance was placed upon the decision of a Division Bench of the Calcutta High Court in *Sarat Chandra Maiti v Bibhawati Debi* (1) In that case it was held that when property is attached under s 146, Cr P C it vests in the legal custody and during the continuance of the attachment such custody is for the benefit of the true owner If the true owner was in fact in possession when the attachment was effected, his possession in the eye of law is not interrupted If, on the other hand, the wrongdoer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession and from the moment of attachment the possession of the true owner revives in the eye of law The intervention of the public authorities for the preservation of peace operates in the same way as *vis major* of a flood and the constructive possession of the land is thereafter, if any to remain in the true owner The view taken by the Calcutta High Court is to some extent supported by the decision of the Supreme Court in *Ittyavire Mathai v Varkey* (2) In that case the trespass commenced somewhere after 12th July, 1099, the order under s 145, Cr P C was passed on 28th November, 1111 by the Magistrate and the finding was that the trespasser was in possession Against the Magistrate's order there was a revision to the High Court which was dismissed on 15th February, 1113 Ultimately the suit for possession was filed on 4th March, 1118 The Supreme Court held that the suit was a simple

(1) Vol 66 Indian Cases 488.

(2) AIR 1964 SC 907.

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one for recovery of possession from a trespasser and would be governed by the 12 years rule of limitation. It held that the suit was within time on the view

“As we have already pointed out, after the application was made by the respondents under s 145, Code of Criminal Procedure, the Magistrate before whom it was made, ordered attachment of property and placed it in the possession of the receiver who continued to be in possession till the final decision of those proceedings. The possession of the receiver during this period would necessarily enure for the benefit of the successful party. If, therefore, this period is taken into account of, the respondent's suit would be well within time.”

From the material itself, it is apparent that even on the basis of 12 years period of limitation the suit will be within time if the possession of the receiver enures for the benefit of the plaintiff of that suit and not otherwise. It is thus clear that the terms “successful party” was used by the Supreme Court to denote the party who has been found to be having title to the plots, as contradistinguished from a trespasser.

These decisions show that the possession of the court or of a receiver under s 145, Cr P C enure for the benefit of the real owner. If it is found that the trespasser was actually in possession on the date of the preliminary order, then the effect of the court's possession thereafter is to effect an interruption in his possession. The trespasser cannot count the period of the possession of the court or the receiver as his own possession for the purpose of limitation for a suit for ejectment or possession. In this view, the period between 8th May, 1958 and 29th January, 1960 could not be counted in favour of the trespasser-respondents.

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ANEG SINGH  
v  
RAM NATH  
S Chandra,  
J

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(1) Vol 66 Indian Cases 488.

(2) AIR 1961 SC 907.

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It cannot be said that the appellants' title extinguished because the respondents were in possession for more than six years. Their possession for the purposes of this case would commence only from 29th January, 1960. Their possession prior to 8th May, 58 will be deemed to have been interrupted by the passing of the preliminary order and taking over of the possession by the criminal court in pursuance of the preliminary order.

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v  
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In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed with costs.

*Appeal allowed*

### CRIMINAL REFERENCE

*Before Mr Justice K N Srivastava and Mr Justice P N Bakshi*

1978  
April, 19

SANKATHA SINGH

APPLICANT,

v

RAHMAT ULLAH AND OTHERS

RESPONDENTS

**Code of Criminal Procedure, 1898, s 145—Existence of breach of peace challenged—Magistrate to record a finding—Proceedings to be dropped if no such apprehension**

Where the existence of the apprehension of the breach of peace is challenged and evidence is led, the Magistrate must record a finding one way or the other because the very foundation of the jurisdiction of a Magistrate in cases under s 145, Cr P C is based on the existence of a dispute giving rise to apprehension of breach of peace. As soon as the apprehension of breach of peace ceased to exist or if it never existed the jurisdiction of the Magistrate to proceed with the case ceases and the only order he has to pass is to drop the proceeding and to release the property in dispute.

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SANKATHA  
SINGH  
v  
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ULLAH

—, ss 145(5) and 146—*Reference to the Civil Court—  
Cancellation of preliminary order subsequently*

The Magistrate, even after the reference has been made, has power to proceed under s 145(5), Cr P C and to cancel the preliminary order if the situation so demands

*Sheo Nath Singh v Mannoo Singh* (1) followed, *Ramji Singh v State of U P* (2) distinguished

Criminal Reference no 776 of 1971 made by the Sessions Judge, Varanasi

*Sankatha Rai*, for the Applicant

*S A Ansari and N N Singh*, for the Respondent

K N SRIVASTAVA, J —The facts giving rise to this reference are as follows.

Sankatha Singh applicant filed an application under s 145, Cr P C with the allegations that he was owner in possession of plot no 129 area 70 acre situated in village Kushmura, P S Baragaon, district Varanasi with which opposite-parties have no concern; that opposite-parties wanted to take forcible possession over the aforesaid plot which gave rise to apprehension of breach of peace

A police report was called by the Sub-Divisional Magistrate. On 5th January, 1970 the police reported that there was apprehension of breach of peace between the parties regarding the land in dispute. Acting on this report, the Sub-Divisional Magistrate passed the preliminary order under s 145(1), Cr P. C on 6th January, 1970 and directed the parties to file their respective written statements. Banarsi made an application to be added as a party. It was allowed and he also filed his written statement claiming 47 acre area to be in his possession on the basis of a sale deed of the year 1923. Both the opposite-parties contended that there was no apprehension of breach of peace and led evidence in support of their above contention.

(1) 1969 A W R 817.

(2) 1972 A W R 445

It cannot be said that the appellants' title extinguished because the respondents were in possession for more than six years. Their possession for the purposes of this case would commence only from 29th January, 1960. Their possession prior to 8th May, 58 will be deemed to have been interrupted by the passing of the preliminary order and taking over of the possession by the criminal court in pursuance of the preliminary order.

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In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed with costs.

*Appeal allowed*

### CRIMINAL REFERENCE

*Before Mr Justice K N Srivastava and Mr Justice P N Bakshi*

1973  
April, 19

SANKATHA SINGH

APPLICANT,

v

RAHMAT ULLAH AND OTHERS

RESPONDENTS

*Code of Criminal Procedure, 1898, s. 145—Existence of breach of peace challenged—Magistrate to record a finding—Proceedings to be dropped if no such apprehension*

Where the existence of the apprehension of the breach of peace is challenged and evidence is led, the Magistrate must record a finding one way or the other because the very foundation of the jurisdiction of a Magistrate in cases under s. 145, Cr P C is based on the existence of a dispute giving rise to apprehension of breach of peace. As soon as the apprehension of breach of peace ceased to exist or if it never existed the jurisdiction of the Magistrate to proceed with the case ceases and the only order he has to pass is to drop the proceeding and to release the property in dispute.

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 SINGH  
 v  
 RAHMAT  
 ULLAH

—, ss 145(5) and 146—*Reference to the Civil Court—  
 Cancellation of preliminary order subsequently*

The Magistrate, even after the reference has been made, has power to proceed under s 145(5), Cr P C and to cancel the preliminary order if the situation so demands

*Sheo Nath Singh v Mannoo Singh* (1) followed, *Ram Singh v State of U P* (2) distinguished

Criminal Reference no 776 of 1971 made by the Sessions Judge, Varanasi

*Sankatha Rai*, for the Applicant

*S A Ansari* and *N N Singh*, for the Respondent

K N SRIVASTAVA, J —The facts giving rise to this reference are as follows

Sankatha Singh applicant filed an application under s 145, Cr P C with the allegations that he was owner in possession of plot no 129 area 70 acre situated in village Kushmura, P S Baragaon, district Varanasi with which opposite-parties have no concern, that opposite-parties wanted to take forcible possession over the aforesaid plot which gave rise to apprehension of breach of peace

A police report was called by the Sub-Divisional Magistrate. On 5th January, 1970 the police reported that there was apprehension of breach of peace between the parties regarding the land in dispute. Acting on this report, the Sub-Divisional Magistrate passed the preliminary order under s 145(1), Cr P C on 6th January, 1970 and directed the parties to file their respective written statements. Banarsi made an application to be added as a party. It was allowed and he also filed his written statement claiming 47 acre area to be in his possession on the basis of a sale deed of the year 1923. Both the opposite-parties contended that there was no apprehension of breach of peace and led evidence in support of their above contention.

(1) 1969 A W R 817

(2) 1972 A W R 445



The learned Sub-Divisional Magistrate made a reference to the Civil Court as provided under s 146, Cr P C. The learned Munsif held that the first party was in possession of the land in dispute on the date of the preliminary order. The reference was made without recording a finding as to whether an apprehension of breach of peace existed although the existence of breach of peace was challenged by the opposite-parties and evidence was led on this question.

After the finding of the learned Munsif was recorded another application was made by both the opposite-parties that there was no apprehension of breach of peace and the proceedings be dropped. On 23rd December, 1970 argument was heard on the question and 7th January, 1971 was fixed for evidence on the question of breach of peace. No further evidence was led. On 17th February, 1971, the learned Sub-Divisional Magistrate recorded a finding that no apprehension of breach of peace existed and the proceeding under s 145, Cr P C was dropped.

Being dissatisfied, the first party filed a revision in the court of the Sessions Judge, Varanasi who made a reference for quashing the aforesaid order passed by the Sub-Divisional Magistrate. This reference came for hearing before a single Judge of this Court. Before the single Judge, two decisions of this Court were cited. One was a Division Bench decision—*Sheo Nath Singh v Mannoo Singh Yadav* (1), and the other was a single Judge decision *Ramji Singh v State of U P* (2). The learned single Judge was of the view that the decision in *Ramji Singh's* case (2) was not correct and, therefore, this reference was referred to this Bench.

Two legal questions arise for determination in this case. One is whether after the preliminary order is

(1) 1969 A W R 817

(2) 1972 A W R 445

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passed and cognizance is taken, is the Magistrate bound to record a separate finding when the existence of breach of peace is challenged and evidence is led on this question rejecting or accepting the above plea. The second question arises is as to whether the Magistrate has the power to drop the proceedings under s 145, Cr P C even after the finding of the Civil Court is received one way or the other.

S 145(1), Cr P C lays down that when a District Magistrate, Sub-divisional Magistrate or a Magistrate First Class is satisfied about the existence of breach of peace either on police report or any other information that there is an apprehension of breach of peace, he has to record his reasons for the same in writing of his being so satisfied and after recording this preliminary order, the Magistrate shall call upon the parties to file their respective written statements and to prove their respective claims by affidavits or evidence.

S 145(5), Cr P C reads as below

“Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed, and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-s (1) shall be final.”

In this sub-section, the most relevant word is ‘showing’. Law Lexicon gives the following meaning of the word ‘show’

“to make it clear and apparent by evidence, testimony or reasoning and to prove.”

The above meaning of the word ‘showing’, therefore, makes it clear that after challenging the existence of

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(1) 1969 A W R 817

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passed and cognizance is taken, is the Magistrate bound to record a separate finding when the existence of breach of peace is challenged and evidence is led on this question rejecting or accepting the above plea. The second question arises is as to whether the Magistrate has the power to drop the proceedings under s 145, Cr P C even after the finding of the Civil Court is received one way or the other.

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In this sub-section, the most relevant word is ‘showing’. Law Lexicon gives the following meaning of the word ‘show’

“to make it clear and apparent by evidence, testimony or reasoning and to prove.”

The above meaning of the word ‘showing’, therefore, makes it clear that after challenging the existence of

apprehension of breach of peace, a party has to prove it by reliable evidence that the apprehension of breach of peace did not exist or has ceased to exist. It is then and then alone that the Magistrate shall cancel his preliminary order passed earlier. In case it is not cancelled, then the said preliminary order shall become final. Therefore, what emerges from the reading of the section is that the party concerned has not only to challenge the existence of apprehension of breach of peace but has also to adduce reliable and convincing evidence in support of this fact.

A question will arise that the evidence adduced was not found satisfactory by the Magistrate concerned and, therefore, he did not cancel the preliminary order which became final. The question has to be decided objectively after considering the evidence on the record. The matter is not left at the sweetwill of the Magistrate otherwise it might result in serious consequences and will be opposed to the very principle of natural justice.

S 435, Cr P C empowers the High Court, Sessions Judge, District Magistrate or any Sub-Divisional Magistrate empowered on this behalf to call for and examine the record of any proceedings before any inferior criminal court to satisfy itself or himself the correctness, legality or propriety of any finding, sentence or order recorded or passed. This power is conferred in all criminal cases. In cases where the preliminary order is cancelled by a Magistrate on being satisfied that the apprehension of breach of peace did not exist or has ceased to exist, the order can be revised under s 435, Cr P C. But what would happen where the evidence is satisfactory and yet the order is not cancelled, and no reason in writing is given for not accepting the evidence adduced by the party. In such an eventuality, an argument that the Magistrate was not satisfied with the evidence and so he did give his reasons in writing

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for not cancelling the preliminary order would be futile and without any material on record. Accepting such an argument will amount to denial of the very foundation of natural justice. In this view of the matter, it appears just, equitable and proper that when the existence of apprehension of breach of peace is challenged and evidence is led, the Magistrate must record a finding as to whether the evidence was sufficient to show that the apprehension of breach of peace did not exist, ceased to exist or it existed and continued to exist.

In the light of the above discussion, the following observation in *Sheo Nath Singh v Mannoo Singh Yadava* (1) can be read with advantage.

"To us the position seems to be perfectly simple. Proceedings under section 145, Cr P C may be initiated either by a party or upon a police report. If the Magistrate is satisfied, either upon the police report or upon other information that there existed a dispute likely to cause a breach of the peace concerning any land etc., he may make a preliminary order in writing stating the ground of his being so satisfied. The order is then served upon the parties requiring them to appear and to put in their written statement, documents, affidavits and oral evidence. The Magistrate may, if he considers the case one of emergency, attach the property. If after the parties have appeared, the existence of such a dispute is not challenged, the preliminary order becomes final and the Magistrate is then to decide whether any and which of the parties is in possession. But if any of the parties or any other person challenges the existence of such a dispute and adduces evidence

(1) 1969 A W R 817.

to support his contention the Magistrate must first decide this question. The raising of this question really amounts to the raising of a jurisdictional question. Sub-s (5) provides that the Magistrate shall cancel the preliminary order if it is shown to him that no such dispute exists or had existed. How can this be shown to the Magistrate unless he examines the material placed before him and arrives at a conclusion one way or the other? This necessarily means that sub-s (5) casts a duty upon the Magistrate to decide the question raised before him. If he comes to a decision that such a dispute exists the preliminary order will become final and he will go on to decide the question of possession. But, if he arrives at the conclusion that no such dispute exists he shall cancel the preliminary order and stay further proceedings. Whatever his decision the Magistrate must record it in writing together with his reasons therefore either as a part of the final order or as a separate order. Neither on principle nor on authority can the view be justified that the Magistrate need not record his decision in writing on the challenge to the existence of the dispute and that the continued existence of the dispute should be presumed from the fact that the Magistrate has gone on to decide the question of possession."

We are, therefore, in entire agreement of the principle laid down in *Sheo Nath Singh's* case (1) that where the existence of the apprehension of breach of peace is challenged and evidence is led, the Magistrate must record a finding one way or the other because the very foundation of the jurisdiction of a Magistrate in

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cases under s 145, Cr P C is based on the existence of a dispute giving rise to apprehension of breach of peace. It has been the constant view of this Court and other High Courts that as soon as the apprehension of breach of peace ceased to exist or if it never existed, the jurisdiction of the Magistrate to proceed with the case ceased and the only order he has to pass is to drop the preceeding and to release the property in dispute.

The power of the Magistrate to act under s 145 (5) Cr P C. is in no way curtailed after he has proceeded under s 146, Cr P C ss 145 and 146, Cr P C have both to be read together. If s 146, Cr P C was to be read independently of s 145, Cr P C, it will be impossible to reconcile the provisions of both the sections. They are not exclusive of each other. In this view of the matter, when a Magistrate vacates the order of attachment on being satisfied that the apprehension of breach of peace has ceased to exist, his jurisdiction to proceed with the case ceases to exist and he has no option left but to pass another order cancelling the preliminary order. We do not think that when the jurisdiction of the court which refers a question of possession to the Civil Court under s 438, Cr P C ceases to exist, the court, to which the reference is made, continues to have its jurisdiction. It was argued that proviso to s 146, Cr P C does not speak of an order cancelling the preliminary order and, therefore, all that a Magistrate is empowered after proceeding under s 146, Cr P C is to vacate the order of attachment. For the reasons given above, we do not agree with this argument. The Legislature had empowered the Magistrate to cancel the preliminary order as provided under s 145(5), Cr P C and, therefore, there was no need to make a further mention of it in the proviso to s 146, Cr P C. We are, therefore, of the opinion that the



Magistrate, even after the reference had been made, has power to proceed under s 145(5), Cr P C and to cancel the preliminary order if the situation so demands. From a perusal of the judgment in *Rimji Singh v State of U P* (1) it appears that *Sheo Nath Singh's* case (2) was brought to the notice of the learned single Judge who observed as below

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"The Division Bench has held that the raising of this question really amounts to the raising of a jurisdictional question and, therefore, duty is cast upon the Magistrate to decide the question raised before him. But in my opinion in a case where the plea is taken but no evidence is adduced in support of the plea or even if the evidence is adduced that the plea is not pressed before the Magistrate, the Magistrate is not bound to decide the question. In the instant case it has not been shown to me that the applicants adduced any evidence in support of the plea taken in the written statement and from the conduct of the applicants as it appears the plea on the basis of the evidence if any, was given up by the applicants and, therefore, in every case the Magistrate is not bound to record a finding as required under sub-cl (5) of s 145, Cr P C. Sub-cl (5) of s 145, Cr P C puts a check on the continuation of the proceeding but does not take away the jurisdiction of the Magistrate which is vested in him and which he exercises under sub-cl (1) of s 145, Cr P C. If the Magistrate before the passing of the order under s 145, Cr P C had omitted to pass any order under sub-cl (5) of s 145, Cr P C the parties could proceed under the proviso to sub-s (1) of s 145, Cr P C and apply to the magistrate once again that there was no longer any likelihood of

(1) 1972 A W R 445

(2) 1969 A W R 817

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breach of peace in regard to the subject-matter of dispute and he should withdraw the attachment and the Magistrate, if he is satisfied would do so but in the instant case the applicants did not move the Magistrate under the proviso to s 146(1), Cr P C and awaited the result of the finding of the civil court. The finding was recorded by the civil court under section 146 (1-B), Cr P C and when once the finding in the proceedings was submitted to the Magistrate, the Magistrate was bound to proceed to dispose the proceedings under section 145, Cr P C in conformity with the decision of the Civil Court and he could not have thereafter adverted to s 145(5), Cr P C. The applicants in the instant case did not even apply to the Magistrate once again after the receipt of the finding of the civil court that there was no apprehension of breach of peace between the parties and he could drop the proceedings under section 145(5), Cr P C. From the conduct of the applicants as it appears it could well be inferred that although a plea was taken by the applicants in the written statement but they did neither seriously press the plea before the Magistrate nor took any steps thereafter and awaited the result of the finding and the order of the Magistrate. In my opinion, therefore, they cannot be allowed to raise such a plea of jurisdiction. There was no lack of jurisdiction in the Magistrate and as I have already expressed my opinion earlier that sub-cl (5) of s 145, Cr P C only puts a break on the jurisdiction that is being exercised by the Magistrate under sub-cl (1) of s 145. It does not take away the jurisdiction which he has once exercised and if under section 145(5) the Magistrate comes to a finding at a later stage that there is no apprehension of breach of

peace he may drop the proceedings In my opinion, the proceedings of the Magistrate are not vitiated and the Division Bench case does not help the applicants "

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With due deference to the learned single Judge, we do not agree with the above reasoning Once a Magistrate records a finding under s 145(5), Cr P C that breach of peace did not exist or it ceased to exist, his jurisdiction to proceed with the case comes to an end If he had proceeded earlier on the assumption that there was an apprehension of breach of peace, he had acted without any jurisdiction Thus, as said above, the foundation of jurisdiction of a Magistrate to proceed under s 145, Cr P C is based on his being satisfied that there was a dispute which was likely to result in breach of peace This s 145(5), Cr P C has a wide scope and the provision can be applied at any stage because the proceedings under s 145, Cr P C are only of a quasi-judicial nature and the final order passed by a Magistrate under s 145, Cr P C is subject to decision by a competent civil court S 145, Cr P C was brought on the statute only to check breach of peace and, therefore, it could only be applicable so long as the breach of peace exists In this view of the matter, the Magistrate has power to drop the proceedings and even after the finding received by the civil court following the provisions contained in s 145, Cr P C subject to the condition that the question of the existence of breach of peace has been challenged and evidence has been led but no finding has been recorded before referring the question of possession to the civil court In such an eventuality, the question of existence of breach of peace has to be decided even though the finding of the civil court has been received It must be made clear that when the above conditions are not satisfied,

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the question of deciding the above question does not arise and in this garb a Magistrate does not get the power to undo the finding of the civil court which is binding on the Magistrate. Cases may arise where by lapse of time, apprehension of breach of peace might have ceased to exist and the parties, instead of fighting their rights in summary proceedings, could very well approach the competent court for redress of the same.

In this view of the matter, we are, therefore, of the opinion that the decision in *Ramji Singh's* case (1) cannot be taken to be an authority on the question that after the reference under s 146, Cr P C or after the receipt of the finding by the civil court, the Magistrate has no jurisdiction to proceed under s 145(5), Cr P C. It should be noted here that in *Ramji Singh's* case (1), there was no evidence except that the question of apprehension of breach of peace being challenged in the civil court, there was neither evidence nor even an application was made at a later stage challenging the existence of apprehension of breach of peace. But, as observed by us earlier, where the question of apprehension of breach of peace is challenged and evidence is adduced, the Magistrate must write an order giving his reasoning one way or the other so that the same could be examined by the superior court for satisfaction that the same was correct and legal.

In the instant case, the opposite-parties challenged the existence of breach of peace in their written statement. They adduced evidence in support of the same. The Magistrate did not record a finding on the above evidence either way and referred the question of possession to the civil court as provided under s 146, Cr P C. It was then again that the application was made and the Magistrate was requested to decide the question.

as to whether the apprehension of breach of peace existed or not. No doubt, on the date on which the parties were given time to adduce evidence, no evidence was adduced by the opposite-parties but that would not affect the merit of the case because the opposite-parties had already adduced their evidence on the point and they could not adduce any further evidence. We have perused the order of the Magistrate holding that breach of peace did not exist and we think that this order is based on the evidence on record. The order passed by the Magistrate in the instant case was fully justified and in accordance with law.

For the above reasons, we are, therefore, of the opinion that the reference made by the learned Sessions Judge has no force in it. It is hereby rejected.

*Reference rejected*

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### CIVIL MISCELLANEOUS (F. B.)

*Before Mr Justice S Chandra, Mr. Justice H N Seth  
and Mr Justice N D Ojha*

MESSRS THAKUR DAS SHYAM

SUNDER

. . . PETITIONER,

*v.*

ADDITIONAL COMMISSIONER,

INCOME TAX AND ANOTHER RESPONDENTS.

*Indian Income Tax Act, 1961, s. 56—Dharmada received under  
custom—Not an income of the assessee*

When it was not disputed that the petitioner received *dharma* under a custom according to which it was obligatory upon it to spend the amount so collected on charity alone and he had created a fund for that purpose and had credited to that fund the amount so collected, *held* that it was not received by the assessee as its income.

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*Held further, that there was no conflict between Biji Cotton Mills Ltd v Commissioner of Income-tax, U P. (1) and Kanpur Agencies Private Ltd v The Commissioner of Income-tax, Lucknow (2)*

Civil Miscellaneous Writ no 2713 of 1972

*K M L. Hajela*, for the Appellant

*S C*, for the Respondents.

H N SETH, J —This is a petition under Art 226 of the Constitution. The petitioner Messrs Thakur Das Shyam Sunder prays for a writ of *certiorari* for quashing the order of the Additional Commissioner of Income-tax, U P, Lucknow, dated 15th of January, 1972.

The petitioner is a commission agent carrying on its business in Shahjahanpur. It claims that in the district of Shahjahanpur there is a long standing custom according to which the commission agents charge on every transaction of sale of goods worth Rs 100 a sum of 15 paise from the person to whom goods are sold and 10 paise from the person whose goods are sold through them, as *dharmada*. This charge is over and above the commission which a commission agent is entitled to receive from both the parties. *Dharmada* so collected is a customary levy which is realised and credited by the commission agents in a separate account known as *dharmada* account. This amount is held by them on trust to be utilised specifically and exclusively for charitable purposes. During the accounting year, relevant to assessment year 1970-71, the petitioner received and credited a sum of Rs 2,400 in its *dharmada* account. Income-tax Officer, Shahjahanpur treated this receipt as petitioner's income and brought it to tax. Being aggrieved by the order of the Income-tax Officer, the

(1) (1970) 76 I T R 194

(2) (1968) 70 I T R 307

petitioner filed a revision before the Commissioner of Income-tax, U P, Lucknow which was rejected on 15th January, 1972. The Additional Commissioner held that the amount in dispute was received by the petitioner during the course of business transaction and was undoubtedly its trading receipt, the ownership in the funds vested entirely in the petitioner, who was free to spend the amount according to its own discretion. In the circumstances, the Income-tax Officer was justified in treating the amount of *dharmada* received by the petitioner as its trading receipt and in including it in its income. The petitioner then filed the present writ petition before this Court contending that the amount of *dharmada* collected by it was not its income and the income-tax authorities had no jurisdiction to include the same in its total income.

Learned counsel for the petitioner pointed out that the petitioner had been collecting *dharmada* and crediting the same in the *dharmada* account for last several years. From this account, it had been making contribution to charity from time to time. For the assessment year 1968-1969, when a similar question arose for consideration, the Appellate Assistant Commissioner of Income-tax held that the amount realised as *dharmada* was not the income of the petitioner and as such it was not liable to be taxed in its hands. During the accounting year relevant to the assessment year 1970-71 also the petitioner received a sum of Rs 2,400 as *dharmada* for being credited to its *dharmada* account which was already in existence.

The Division Bench, before which the petition came up for hearing, thought that on the point raised in this petition there is a conflict between two decisions of this Court viz that in the cases of *Bijli Cotton Mills Ltd v. Commissioner of Income-tax* (1) and *Kanpur Agencies*

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*Private Ltd. v. Commissioner of Income-tax, Lucknow* (1) It accordingly referred this case for decision by a larger Bench.

Petitioner's allegation that in the district of Shahjahanpur there is a custom according to which the commission agents realise *dharmada* from their constituents and spend the same on charity has not been controverted by the respondents. It is also clear that in pursuance of that custom the petitioner opened an account several years before the previous year relevant to the assessment year 1970-71, in which all the amounts realised by him as *dharmada* were being credited and as and when occasion arose, the amount in that account was being utilised for charity. It can also be safely presumed that in this case the parties, which in the relevant accounting year entered into transactions through the petitioner, were aware of the trading custom and they paid *dharmada* to the petitioner with the knowledge and understanding that the amount so paid by them was to be credited to the fund which had already been opened by the petitioner for purposes of charity.

As pointed out by the Supreme Court in the case of *Commissioner of Income-tax v Sheorji Vallabh Trust and Co* (2), income-tax is a levy on income. No doubt the Income Tax Act takes into account two points of time, at which the liability to tax is attracted, viz the accrual of the income or its receipt, but the substance of the matter is the income. If income does not result at all there cannot be a tax even though in book keeping an entry is made about hypothetical income which does not materialise. Where income has in fact been received and is subsequently given up it remains the income of the recipient, even though given up and the

(1) (1968) 70 I T R. 387

(2) (1962) 46 I T R 144 at 148



tax with regard to it is payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income even though an entry to that effect might in certain circumstances have been made in the books of account.

The question, therefore, that arises for consideration is whether if while entering into business transactions through the petitioner, various parties made contribution to its *dharmada* fund, such contributions constituted petitioner's income.

In the case of *Commissioner of Income-tax, Bombay City II v Sital Das Tirath Das* (1), the Supreme Court laid down the principle for determining as to when and in what circumstances receipt of an amount by an assessee can be considered to be his income for the purposes of the Income Tax Act. In this connection their Lordships of the Supreme Court observed as follows:

"In our opinion the true test is whether the amount sought to be deducted in truth never reached the assessee as his income. Obligations no doubt there are in several cases but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligations cannot be said to be a part of the income of the assessee. Where by the obligation, income is diverted before it reaches the assessee it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequence in law does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay

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another a portion of one's own income which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it does so not as a part of his income but for and on behalf of the person to whom it is payable."

In the instant case what we find is that there was a custom in the market according to which commission agents realised *dharmada* from their constituents. The constituents paid that amount to the commission agents knowing that the same was being collected over and above the commission which was payable by them to the commission agents. This amount, under the custom, had to be spent on charities. The amount was being paid by the constituents for being made a part of the fund which had already been established by the commission agents for purposes of charity. From the very beginning it was clear to both the parties viz the one paying *dharmada* and the other receiving the same that it was being received by the petitioner for being credited to an already existing fund for charity. Accordingly, when this amount reached the petitioner it did not in truth reach him as his income.

Learned counsel for the revenue placed strong reliance on the case of *Commissioner of Income-tax v Thakur Das Bhargava* (1). In that case what had happened was that an assessee who was an advocate was originally reluctant but later on agreed to defend certain accused persons in a criminal trial on condition that he would be paid a sum of Rs 40,000 for creating a public charitable trust. When the trial was over the assessee was paid a sum of Rs 32,000 and he created a trust in respect of that amount by executing a trust deed. In the circumstances the Supreme Court held that the sum of Rs 32,000 received by the assessee was

(1) (1960) 40 I.T.R. 309.

his professional income. At the time when the assessee received the amount no trust or obligation in the nature of a trust was created. When the assessee created a trust by executing the trust deed he applied a part of his professional income for purposes of that trust. It was further observed that mere desire on the part of the assessee to create a trust from out of the monies paid to him neither created a trust, nor did it give rise to any legally enforceable obligation. Judgment of the Supreme Court makes it clear that according to it there was no trust in existence for and on behalf of which the money had been received by the assessee. Its judgment might well have been otherwise if it could be shown that there was a trust already in existence and the sum of Rs 32,000 had been received by the Advocate concerned for being credited to that fund.

Reliance was also placed on the case of *India Paper and Spice Trade Association v Commissioner of Income-tax, Kerala* (1). In that case, under the bye-laws of the Trade Association, contribution at a certain rate in respect of goods sold, was payable to the Association by the seller as well as the buyers as *laga*. The Income-tax Authorities and the Tribunal held that the money collected by the Association as *laga* was liable to be assessed as income of the Association under s 10(6) of the Income Tax Act. Learned Judges of Kerala High Court held that there was nothing in the case to justify an inference that the *laga* collected was a collection for religious or charitable purposes as alleged and that it was a remuneration, definitely related to the specific services performed by the members of the Association. It was not a voluntary payment unrelated to the membership of the Association but was an overall charge for the services performed by the Association in respect of buying and selling of goods over and above the

(1) (1966) 55 I.T.R. 409.

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separate fees prescribed for many of those services and as such that income had rightly been assessed under s 10(6) of the Income Tax Act which provides that a tax is to be payable by an assessee under the head profits and gains of business profession or vocation. A trade, profession or similar association, performing specified services for its members for remuneration definitely related to those services is deemed for the purposes of that section to carry on business in respect of those services and the profits and gains therefrom are liable to tax accordingly. Facts of that case are clearly distinguishable from the facts of the present case. In this case, *dharmada* was being realised for being credited to a fund which had been reserved by the petitioner for purposes of charity and not for performing or rendering any specified services to the persons who made the contribution.

Learned counsel for the revenue then relied upon the case of *Kanpur Agencies Private Ltd. v Commissioner of Income-tax, Lucknow* (1). In that case the assessee who was the sole selling agent of a cotton mill realised from the purchasers, on each bale of goods, some amount towards charity and the same was collected and credited in a separate account in assessee's books which was styled as Marwari Charitable account. The Tribunal found that although the amount was realised by the assessee from its customers apparently on the ground of charity and although the amount was credited to the account Marwari Charitable Society, the disbursement of the amount was entirely within the discretion of the assessee and the assessee was not bound to devote any amount to the Marwari Charitable Society. It was held that the amount having been realised by the assessee from its customers as a part of and in connec-

(1) (1968) 70 ITR 337

tion with the sale transactions must be treated as its business income. It will be seen that in that case the Tribunal did not accept the case of the assessee that the amount realised by the assessee from its customers had necessarily to be spent on charity. According to the findings arrived at in that case, the amount had been realised by the assessee for its own purposes and it had full discretion to spend the amount for any purpose whatsoever. The amount was not held in trust by the recipient and there was no binding obligation on it to apply the same for charitable purposes. In the case before us, however, the amount has been realised for the purposes of a fund reserved for charity. The facts of this case cited by the learned counsel for the revenue are, therefore, quite distinguishable.

Learned counsel for the revenue further relied on the case of *Messrs. Chaurangi Sales Bureau Private Ltd v Commissioner of Income-tax, West Bengal* (1). In that case the assessee company was a dealer in furniture and also acted as an auctioneer. In respect of the sales effected by it as auctioneer, during the accounting year ending 31st March, 1960, it realised in addition to its commission a sum of Rs 32,986 as sales tax which was credited in the books of the assessee under the head Sales Tax Collection Account. Though the assessee as a seller, was liable to deposit the sales tax with the State Exchequer but it did not do so. It also did not pay the amount to the person whose goods it auctioned. The question that arose for consideration was whether in these circumstances the amount of sales tax retained by the assessee could be included in its business income for the assessment year 1960. The Supreme Court held that the sales tax was received by the assessee in its character as an auctioneer, accordingly it form-

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(1) AIR 1973 SC 876

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formed part of its trading or business receipt and as such was liable to be included in its business income. The assessee could claim the deduction in respect of that amount only when it paid it to the Government. It is the true nature and quality of the receipt and not the head under which it is entered in the account books that is decisive of the matter. If a receipt is a trading receipt the fact that it is not shown in the account books of the assessee would not prevent the assessing authority from treating it as a trading receipt. Ratio of this case is that in order to determine whether a particular receipt is income or not, its true nature and quality has to be determined. Considering the nature of the sales tax receipts and the liability of the dealer to pay the same, the Supreme Court came to the conclusion that the amount collected under the head sales tax was really the income of the assessee. This decision does not lay down that each and every receipt, during the course of a business transaction, must necessarily be the income of the recipient. It emphasizes that in each case the true nature and the quality of the receipt has to be considered. As pointed out earlier, the case of the petitioner that in the district of Shahjahanpur, *dharmada* is a customary levy which is to be necessarily spent for purposes of charity has not been controverted in the present case. That being so, the fact that *dharmada* was being collected and credited to an account reserved for charity clearly shows that it was never intended to be the income of the recipient. Moreover, the custom is not that the petitioner is required to spend on charity some amount from out of its income whether or not it recovered the same from its constituents.

In view of the aforesaid discussion, we agree with the proposition laid down in the case of *Agra Bullion*

*Exchange Ltd v Commissioner of Income-tax* (1), wherein it has been held that a receipt earmarked as charity by the person making the payment does not accrue as an item of income to the assessee. In respect of the amounts given for charity, the assessee could be likened to a conduit pipe through whom the amounts pass. The decision of a Division Bench of the Calcutta High Court, in the case of *Commissioner of Income-tax, West Bengal v. Tolly Ganj Club Ltd* (2) fully supports the view taken by us.

Learned counsel for the revenue then relied upon the observations made by the Additional Commissioner in his order dated 15th January, 1972 where he mentioned that the petitioner could not be held to be a trustee in respect of *dharmada* receipts inasmuch as it is well settled that in the case of a trust the trustees have no dominion over the funds and no benefit is received by them. As, in the instant case, the ownership of the funds, realised by way of *dharmada*, vests entirely in the petitioner who is free to spend the amount according to its own discretion its position *qua* the *dharmada* account is not that of a trustee. The petitioner owns the amount which in fact is its income. We are unable to accept the submission that as the ownership of the amounts credited to the *dharmada* account vest in the petitioner and it enjoys some discretion with regard to its disposal it cannot be said that its position is that of a trustee. The question whether the position of the petitioner, when he received the amount, was that of a trustee or not will depend upon the actual custom which obliged the constituents to pay *dharmada*. As stated earlier, the petitioner's case that the amount realised as *dharmada* has got to be spent on charity has not been controverted by the respondents. Under the law relating to trust, legal ownership

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(1) (1961) 41 I T R. 472

(2) (1971) 79 I T R. 179,

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over the trust fund and the power to control and dispose it of always vests in the trustee. Accordingly, merely because in this case the legal ownership over the amount deposited as *dharmada* vested in the petitioner it cannot be said that its position was not that of a trustee. Discretion vested in a trustee to spend the the trust amount over charities, will not effect the character of deposit. In the case of *Commissioner of Income Tax, West Bengal v Sardar Bahadur Sardar Indra Singh Trust* (1), it has been pointed out that it is now well settled that to the rule that there is no valid trust unless the objects thereof are specified, charitable trusts are an exception. With regard to those trusts a great deal of latitude is permitted and the rule is that provided there is a clear intention to make a gift for charity, the trust is not allowed to fail for uncertainty. The theory upon which the rule rests is that in the case of charitable trusts, charity in the abstract is to be taken to be the object and the specific purposes to which the fund or the income of the fund may be applied, constitute only the mode of administering the trust. Indefiniteness as regards the specification of the objects is, therefore, regarded only as an indefiniteness in regard to the manner in which the trust will be administered. So, if a clear intention to create a trust in favour of charity is discernible, defects in the mode prescribed or absence of any such prescription does not invalidate the trust. The defect is taken as attaching to a matter which is not essential. It has, therefore, been held that a trust deed barely creating a trust for charities without specifying any charities at all is valid. The Court in such cases can always intervene and choose appropriate charities which it considers proper although it will always pay regard to the wishes of the Trustor in so far as they are ascertainable from the language of the deed. Accordingly, even if some

(1) A I R 1986 Cal 164



discretion was given to the petitioner to spend the amount deposited with it on a charity of its own choice, it does not mean that either no trust was created or the trust so created was invalid. In our opinion the finding recorded by the Additional Commissioner of Income-tax merely means that the petitioner was free to apply the trust fund on a charity of its own choice. It does not mean that the petitioner could, if it so liked appropriate the amount credited to *dharmada* account for its own purposes. After all, if *dharmada* was being collected for purposes of charity, in accordance with a custom, its disposal was equally governed by the obligation created by that custom and the amount was to be spent only for some charitable purpose.

We are of opinion that in order to determine whether a particular receipt, by whatever name it is termed, is or is not the income of an assessee its real nature and quality has to be considered. If it was received under a custom, the answer to the question will depend on the nature of obligation created by that custom. In this case it is not disputed that the petitioner received *dharmada* under a custom according to which it was obligatory upon it to spend the amount so collected on charity alone. The petitioner had created a fund for that purpose and *dharmada* collected by it had to be credited to that fund. In the circumstances we are of opinion that the amount so collected was not received by the assessee as its income. We further consider that there is no real conflict in the two decisions of this Court viz that in the cases of *Bijli Cotton Mills Ltd v Commissioner of Income-tax*, U P (1) and *Kanpur Agencies Private Ltd v Commissioner of Income-tax*, Lucknow (2).

(1) (1970) 76 I T R 194

(2) (1966) 70 I T.R. 387

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In view of the aforesaid discussion the petition succeeds and is allowed with costs. The order passed by the Additional Commissioner of Income-tax, dated 15th January, 1972 is set aside and that part of the assessment order, dated 24th February, 1971 passed by the Income-tax Officer, Shahjahanpur which provides for the adding back of a sum of Rs 2,400 (representing *dharmada*) in petitioner's total income for assessment year 1970-71 is quashed. The Income-tax Officer is directed to modify his assessment order accordingly.

*Petition allowed.*

## CIVIL MISCELLANEOUS

*Before Mr Justice Jagmohan Lal and Mr Justice  
 Prem Prakash\**

S D MANIK

.. PETITIONER,

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UNION OF INDIA

AND OTHERS

OPPOSITE-PARTIES

**Indian Railways Establishment Code, Vol II, r 2046(1)—**  
*Railway servant recruited on or after 1st April, 1938—Age  
 of superannuation for*

The railway servants recruited on or after 1st April, 1938 cannot be equated with their counterparts substantively appointed before that date on a ministerial post either by the Indian Railways or by an ex-company or ex-State railway. The dividing line between these two classes of servants is the date line of 31st March, 1938 for the purpose of determining their age of superannuation. This dividing line has a rational nexus with the object sought to be achieved by this classification.

*Railway Board v A Pitchumani* (1) explained

\*While sitting at Lucknow

(1) AIR 1972 SC 808

Writ Petition No 628 of 1972 under Art 226 of the Constitution

*Abid Ali*, for the Petitioner.

*S P. Singh*, for the Opposite-parties

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JAGMOHAN LAL, J —This writ petition has been filed by a railway servant whose date of birth is 24th April, 1914. He was accordingly due for retirement on 24th April, 1972 on attaining the age of superannuation which was fixed at 58 years under sub-r. (2) of r. 2046 of Indian Railways Establishment Code, Vol II The petitioner was, therefore, intimated that he would retire in the afternoon of 23rd April, 1972 He filed this writ petition on 21st April, 1972 alleging that he was not liable to be retired before attaining the age of 60 years and praying for a writ of prohibition commanding the Railway Administration as represented by opposite-parties nos 1 to 4 not to retire him till he attained the age of 60 years

The brief facts so far as relevant for the decision of this writ petition were that the petitioner entered railway service in a temporary capacity in the year 1956 and he was confirmed in the year 1961 on a ministerial post The petitioner had alleged in his petition that before that he was in the service of some Company and was substantively holding a post there in the year 1934 This allegation of the petitioner was denied by the opposite-parties The learned counsel for the petitioner conceded that the petitioner was not in the employ of any railway Company on or before 31st March, 1938, which had been taken over by the Government It appears that formerly, before joining the service of the railways in 1956, he was in the employ of some private Company The case has therefore been argued by the learned counsel for the petitioner on the basis that the petitioner had entered the

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railway service for the first time in the year 1956 and before that he was neither in the railway service nor in the service of any railway Company which was subsequently taken over by the Government of India. Originally the age of superannuation of railway employees of the Central Government who held ministerial posts was 60 years. But on the recommendation of Sapru Committee which was appointed by the Government to investigate the problem of unemployment and make suitable recommendation in that behalf, the age of retirement was reduced to 55 years for ministerial employees also with effect from 1st April, 1938. But in order to protect the rights of the existing employees of the railways it was provided that those ministerial railway servants who entered Government service on or before the 31st March, 1938 and held on that date a lien or suspended lien on a permanent post, or a permanent post in a provisional substantive capacity shall be retained in service till they attained the age of 60 years. This provision was incorporated in r 2046(2)(a) which as originally framed reads as follows:

"A ministerial servant, who is not governed by sub-cl (b) may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances which must be recorded in writing, and with the sanction of the competent authority

(b) A ministerial servant—

(i) who has entered Government service on or after the 1st April, 1938, or

(ii) who being in Government service on the 31st March, 1938 did not hold a lien or a suspended lien on a permanent post on that date.

Shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on public grounds which must be recorded in writing, and with the sanction of the competent authority and he must not be retained after the age of 60 years except in very special circumstances.”

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In the year 1962 the age of retirement was again increased from 55 to 58 years and the protection given to those ministerial servants who were in Government service of the railway before 31st March, 1938 and held a substantive post on that date that they could continue up to the age of 60 years, was retained intact.

On 11th January, 1967 the old r 2046 as amended in 1962 was substituted by a new rule, the relevant portion of which reads as follows:

“2046 (F R 56) (a) Except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of fifty-eight years

(b) A ministerial railway servant who entered Government service on or before 31st March, 1938 and held on that date—

(i) a lien or a suspended lien on a permanent post, or

(ii) a permanent post in a provisional substantive capacity under cl (d) of r 2008 and continued to hold the same without interruption until he was confirmed in that post, shall be retained in service till the day he attains the age of sixty years

NOTE —For the purpose of this clause, the expression ‘Government service’ includes service rendered in ex-Company, and ex-State Railways and in former Provincial Government.”

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On 12th December, 1967 the Note to cl (b) of the aforesaid rule was substituted by a new Note which provided as follows

“For the purpose of this clause the expression ‘Government service’ includes service rendered in a former Provincial Government and in ex-Company and ex-State Railways, if the rules of the Company or the State had a provision similar to cl (b) above.”

From the above history of the r 2046 it would be evident that when this rule was amended with effect from 1st April, 1938 the Government protected the rights of the existing government servants holding a permanent ministerial post on 31st March, 1938 by providing that they may be allowed to continue up to the age of sixty which obviously meant that the reduced age of superannuation fixed at 55 years under this amended rule would apply only to those ministerial servants who entered railway service on or after 1st April, 1938. This was a reasonable classification and no valid exception can be taken to it. A learned single Judge of this Court in *B P Misra v Union of India* (1) had no doubt held that this distinction in the matter of age of retirement between the pre and post 1st April, 1938 railway servants was arbitrary and not based on any rational classification. But in that case the necessary material had not been placed before the Court on behalf of the railway to show that before 1st April, 1938 the age of retirement for ministerial railway servants was sixty years and that is why he thought this classification irrational. Subsequently in another case *Binda Lal v Union of India* (2) the same learned Judge revised his opinion on the basis of the material that was then placed before him and

(1) AIR 1971 All 104

(2) Writ Pet No 820 of 1971  
decided on 7th April, 1972

he held that this classification as regards the age of superannuation between the railway servants who were in service before 1st April, 1938 and those who entered that service after this date, was reasonable and it was not hit by Art 14 of the Constitution. The Supreme Court in *Railway Board v Pichumani* (1) also did not hold this classification as violative of Art 14. What was actually challenged in that case was a certain portion of the Note to cl (b) as substituted on 12th December, 1967 for the previous Note. Under the previous Note Government service included service rendered in ex-Company and ex-State railways and in former Provincial Governments without insisting on the further requirement that the ex-Company or the ex-State railway of the former Provincial Government should also contain a provision in their rules prescribing the age of retirement of ministerial servants as 60 years. In other words, under that original Note even the servants of ex-Company or ex-State railways were given the advantage of higher age of superannuation of sixty years if they happened to be permanent servants of such company or State Railway on 31st March, 1938, but in the amended Note as substituted for the old Note on 12th December, 1967, such servants of the company and the State railways could not automatically get the benefit of this increased age of superannuation of 60 years even though they held a permanent ministerial post on 31st March, 1938 unless the rules of that company or State Railway also provided for the age of superannuation at 60 years. This additional requirement imposed by the new Note was held by the Supreme Court as irrational and violative of Art 14. Perhaps the reason was that as soon as an

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ex-Company or ex-State railway was taken over by the Government of India and its employees were absorbed in the railway service, they became subject to the liabilities of Government Railway servants and were also entitled to the privileges of such servants. One of those privileges available to government servants was that under cl (b) if they happened to hold a permanent ministerial post on or before 31st March, 1938, they could be allowed to continue in service up to the age of 60 years. This benefit was available to the ex-employee of company and State railways also up to 12th December, 1967 when it was suddenly taken away in respect of some of them whose ex-employer did not provide in its rules the increased age of retirement at 60 years.

On behalf of the petitioner it has been argued that since this advantage has been conferred on the ministerial servants of ex-Companies and ex-State railways under the law laid down by the Supreme Court in *Railway Board v A Pitchumani* (1) it should also be extended to those ministerial servants of the Indian Railway, like the petitioner, who had been recruited after 31st March, 1938. This argument is quite fallacious. The railway servants recruited on or after 1st April, 1938 cannot be equated with their counterparts substantively appointed before that date on a ministerial post either by the Indian Railways or by an ex-Company or ex-State railway. The dividing line between these two classes of servants is the date line of 31st March, 1938, for the purpose of determining their age of superannuation. As discussed above, this dividing line has a rational nexus with the object sought to be achieved by this classification. The petitioner cannot come under the first category relating to the servants recruited before 1st April, 1938.

(1) A I R 1972 S C 508



and he admittedly falls in the second category of the servants recruited on or after 1st April, 1938. The petitioner entered railway service in 1956 with the full knowledge of this rule under which the age of retirement was fixed at 55 years (subsequently raised to 58 years). He cannot claim any parity with those railway servants who were recruited before 31st March, 1938 either by the Indian Railways or by a Railway company, subsequently taken over by the Government of India. If the contention of the petitioner is accepted, it will mean redrafting cl (b) of the aforesaid r 2046 as a proviso to cl (a) with the stipulation that all ministerial railway servants whether recruited before 31st March, 1938 or after that date shall be retained in service till they attain the age of sixty years. This can be done only by the rule-making authority and not by this Court. The petitioner's stand is obviously untenable and he has rightly been retired on attaining the age of 58 years.

The writ petition is dismissed with costs to the opposite-parties.

*Writ petition dismissed*

### CIVIL REVISION (F. B.)

*Before Mr Justice S Chandra, Mr Justice K N. Seth and Mr Justice P N Bakshi*

PARSIDH NARAIN

PANDE

DEFENDANT-APPLICANT,

*v*

KALAPNATH AND

ANOTHER

PLAINTIFFS-RESPONDENTS

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" UNION OF  
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**Code of Civil Procedure, 1908, s 115 and s 6 of the U P Civil Laws Amendment Act, 37 of 1972 and Constitution of India, Art 14—S 6 of the U P Act 37 of 1972 not ultra vires of the Constitution of India—Not violative of Art 14**

If the Legislature considered that an order of a District Judge may not be open to revision before the High Court if the order arises out of a suit valued at below a certain amount, it does not result in discrimination but can be justified on the doctrine of permissible classification as it is based on an intelligible differentia which has a rational relation to the object sought to be achieved

S 6 of the U P Act 37 of 1972 is not violative of Art 14 of the Constitution

Civil Revision No 1399 of 1972 and Civil Revision No. 119 of 1973

*Sankatha Rai*, for the Applicant

K N. SETH, J —The following question has been referred to this Bench for its opinion

“Is s 6 of U P Act no 37 of 1972 *ultra vires* of the Constitution being violative of Art 14 thereof?”

Prior to its amendment by s 6 of the Uttar Pradesh Civil Laws Amendment Act (Act no 37 of 1972), s 115 of the Code of Civil Procedure was amended by U P Act 14 of 1970 S 3 of the aforesaid Act provided that for the words ‘High Court’ wherever occurring in s 115, the words ‘High Court or District Court’ shall be substituted, and that at the end the following proviso shall be inserted

“Provided that nothing in this section shall be construed to empower the District Court to call for the record of any case arising out of an original suit of the value of twenty thousand rupees or above.”

U P Act 37 of 1972 passed by the State Legislature received the assent of the President of India on

12th September, 1972 and was published in the *Uttar Pradesh Gazette*, dated 16th September, 1972. A notification under s 3(1) of the Act appointing 20th September, 1972 as the date of its enforcement was published in the *Gazette* of the same date. As amended by s 6 of the U P Act 37 of 1972, s 115, C P C now reads

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"The High Court in cases arising out of original suits of the value of twenty thousand rupees and above, and the District Court in any other case may call for the record of any case which has been decided by any court subordinate to such High Court or District Court, as the case may be, and in which the appeal lies thereto, and if such subordinate court appears,—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court or the District Court may make such order in the case as it thinks fit"

It was contended that s 6 of the Amending Act results in discrimination and is *ultra vires* of the Constitution being violative of Art 14 thereof. It was urged that suits valued at less than twenty thousand rupees are triable not only by a Civil Judge but also by a District Judge. If such a suit is tried by the Civil Judge after the coming into force of the Amending Act, 1972, a party has a right to challenge the decision by filing a revision before the District Judge, but if the same suit is tried by the District Judge, no revision would be maintainable. Similarly if a suit is

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tried by a Munsif, an appeal against his decree could be heard either by a Civil Judge or by a District Judge. An order passed by a Civil Judge in his appellate jurisdiction could be challenged before the District Judge in revision but no revision would be maintainable if the order is passed by a District Judge in an appeal against the decree of a Munsif. It was further contended that if a part of the suit property is in Uttar Pradesh and part of it is in some other State, a party under the law can institute the suit in either of the two States. If the suit is instituted in a State other than Uttar Pradesh, the right of revision of the party remains unaffected but if the suit is filed in the State of Uttar Pradesh, he may be totally deprived of his right to approach to superior court in revision. The discrimination resulting from s 6 of the Amending Act renders that provision *ultra vires* as being violative of Art 14 of the Constitution.

The delay in disposal of suits and the huge accumulation of cases in various courts led the State Legislature to amend s 115 of the Code of Civil Procedure by U P Act 14 of 1970 and to confer on the District Court also the revisional power under the Code of Civil Procedure which was till then exercised by the High Court alone except in cases arising out of an original suit of the value of twenty thousand rupees or above. As a consequence of this amendment concurrent powers of revision was conferred on District Judges along with the High Court in cases arising out of original suits of the value of less than twenty thousand rupees. The High Court's power of revision remained intact and a litigant could approach the High Court, irrespective of the valuation of the suit, either directly or by challenging the revisional order of the District Judge. The amendment failed in its objective of reducing the pressure of cases on the High Court and due to

unavoidable delay in disposal the problem of accumulation of cases in Courts continued unabated. It was in fact further aggravated as the revisional order of the District Judge could be subjected to a further revision before the High Court. It thus became necessary to further amend s 115, C P C. By s 6 of the U P Act no 37 of 1972 the revisional power of the High Court is confined to cases arising out of original suit of the value of twenty thousand rupees or above.

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The constitutionality of s 6 of the U P Act no 37 of 1972 is challenged primarily on the ground that in view of the amended s 115, C P C orders passed in suits of similar nature and valuation may or may not be subject to revision depending on whether the order is passed by a District Judge or a Munsif/Civil Judge and a similar type of discrimination may arise in case of orders passed by a District Judge or a Civil Judge exercising appellate jurisdiction. The amended provision results in creating discrimination and is thus hit by Art 14 of the Constitution.

Art 14 ensures that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. It combines the English doctrine of the rule of law with the equal protection clause of the 14th Amendment to the U S Constitution. The language of the Article suggests that the prohibition is absolute but judicial decisions have incorporated in it the doctrine of classification. The State has power of enacting of law based on or involving a classification founded on an intelligible differentia having a rational relation to the object sought to be achieved by the law.

The true meaning and scope of Art 14 has been explained in several decisions of the Supreme Court.

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and summarised in the case of *Shri Ram Krishna Dalmia v Shri Justice S R. Tendolkar* (1) Some of the propositions, which are established by *Dalmia's* case (1) and other cases to which it refers, are as follows

(1) Art 14 condemns discrimination not only by a substantive law but also by a law of procedure;

(2) Art 14 forbids class legislation but does not forbid classification,

(3) permissible classification must satisfy two conditions, namely,

(i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and

(ii) that differentia must have a rational relation to the object sought to be achieved by the Statute in question,

(4) that classification may be founded on different basis, namely, geographical, or according to objects or occupations or the like,

(5) in permissible classification mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough,

(6) there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

(7) it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds

(8) in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation

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In the light of these well established principles it cannot be ruled that the impugned legislation violates the principles of equality before the law or the equal protection of the laws which is enshrined in Art 14 of the Constitution. The object behind the impugned legislation was to eliminate one of the causes of delay in the disposal of suits. A factor which often leads to delay in disposal of suits is the right of a litigant to approach the superior courts in revision. When an order is challenged in revision it invariably leads to the stay of proceedings in the suit. Due to pressure of work the revisions are not speedily decided with the result that suits remain pending for a considerable period. Apparently the Legislature in its wisdom thought it expedient to confine the revisional power of the High Court to cases arising out of suits of a certain valuation only and to confer that power on the District Judge in cases arising out of suits of valuation below that amount. If the power of the High Court to revise the orders of the subordinate courts in suits or appeals valued at less than twenty thousand rupees has been taken away, it cannot be successfully contended that the classification is not founded on any intelligible differentia and the differentia has no rational relation to the object sought to be achieved. The impugned Act cannot be held to be unconstitutional on the ground that an order may not be open to revision if it is passed by a District Judge trying a suit valued at less than twenty thousand rupees but if another suit of the same valuation is tried by a Civil

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Judge, his order would be open to revision before the District Judge. If the Legislature considered that an order of a District Judge, who is invariably a more experienced officer, may not be open to revision before the High Court if the order arises out of a suit valued at below a certain amount, it does not result in discrimination but can be justified on the doctrine of permissible classification as it is based on an intelligible differentia which has a rational relation to the object sought to be achieved.

The validity of the legislation in question has also been challenged on the reasoning that the Code of Civil Procedure is a Central Act and by the amendment introduced by the State Legislature discrimination would result as an order passed in a suit filed in Uttar Pradesh may not be open to revision but an order passed in a suit of similar nature and of same valuation instituted in another State would be open to revision. The same discrimination would arise where part of the suit property is in Uttar Pradesh and part of it in some other State as under the law a suit can be instituted in either of the two States. The impugned legislation is not open to challenge on this ground also. As observed in *State of Madhya Pradesh v G C Mandawar* (1) "the power of the Court to declare a law void under Art 13 has to be exercised with reference to the specific legislation which is impugned. Art 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different, Art 14 can have no application".

(1) AIR 1960 SC 409



The validity of the impugned legislation thus cannot be challenged on the ground that it results in curtailment of the scope and ambit of the revisional powers of the courts in the State of C. P. in comparison with the powers conferred on the courts in other States.

It was next contended that by enforcing the amended provision from a particular date an arbitrary classification has been made inasmuch as an order already challenged in revision before the appointed date may be governed by the provisions of s. 115, C. P. C. as it stood prior to the 1972 amendment, a revision challenging an order after the amended provision came into force would be governed by a different law although the suits or proceedings giving rise to the two cases may have come into existence at the same time. It is well established by judicial precedents that it is for the Legislature to decide upon the date from which a particular law should come into operation. No plausible argument could be advanced against treating the pending proceedings as a distinct class for the purpose of Art. 11. For the enforcement of the Act a date has to be specified. The Act received the assent of the President on 12th September, 1971 and was published in the *Gazette* dated 16th September, 1972. It was notified that the Act would come into force on 20th September, 1972. The selection of the aforesaid date by the Legislature could not be characterized as arbitrary or fanciful. As observed by SHAN, J. in *Messrs. Hathising Manufacturing Co., Ltd. v. Union of India* (1) "the State is undoubtedly prohibited from denying to any person equality before the law or the equal protection of the laws, but by enacting a law which applies generally to all persons who come within its ambit as from the date on which it becomes operative, no discrimination is practised. The same principle was reiterated in *Messrs. Jain*

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*Brothers v The Union of India* (1) In that case the constitutionality and validity of section 297 (2) (g) of the Income Tax Act, 1961 was challenged on the ground that that provision creates a discrimination between two sets of assesseees with reference to a particular date, namely, completion of assessment proceedings on or after 1st April, 1962. For imposition of penalty assesseees have been classified in two groups those whose assessment has been completed before 1st April, 1962, the proceedings and imposition of penalty would be governed by the Act of 1962 whereas in case of assesseees whose assessment is completed after the specified date, the Act of 1961 would govern the proceedings for imposition of penalty. It was contended that Art 14 was attracted because the classification made was purely arbitrary depending on the accident of the completion of the assessment. The argument was repelled and it was held that the classification was based on intelligible differentia having reasonable relation to the object intended to be achieved.

After a careful consideration of the question raised we are of the opinion that s 6 of the U P Act 37 of 1972 is not violative of Art 14 of the Constitution. Our answer to the question referred is in the negative.

*Question answered*

(1) AIR 1970 SC 776

## SUPREME COURT

## APPELLATE CIVIL

*Before Mr S K Sikri, Chief Justice, Mr Justice J M Shelat, Mr Justice C A Vaidialingam, Mr Justice A N Grover and Mr Justice A N Ray*

HAR SHARMA VERMA

APPELLANT,

v

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March, 16

TRIBHUVAN NARAIN SINGH,  
CHIEF MINISTER, U P AND

ANOTHER

RESPONDENTS

*Constitution of India, Art 164 (4)—Appointment of Chief Minister—No qualification prescribed—Council of Ministers collectively responsible to Legislative Assembly*

Under cl (1) of Art 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They all hold office during the pleasure of the Governor. Cl (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Ministers, but cl (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf.

Civil Appeal No 205 of 1970 from the Judgment and Order dated the 1st November, 1970 of the Allahabad High Court, Lucknow Bench in Writ Petition No 1402 of 1970

The Appellant *in person*

*L M Singhu* (O P Rana with him) for the Respondents

SIKRI, C J —In this appeal by certificate granted by the High Court under Art 132 of the Constitution a short question as to the interpretation of cl 4 of Art 164 of the Constitution arises. This question has arisen in connection with the appointment on 18th

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October, 1970, of Shri Tribhuvan Narain Singh as Chief Minister of Uttar Pradesh. He was not a member of either House of Legislature of the State of Uttar Pradesh at the time of his appointment.

The appellant, who is a rate-payer of the Lucknow Constituency to the Uttar Pradesh Legislative Assembly, filed a petition under Art 226 of the Constitution in the High Court challenging the appointment of the respondent as Chief Minister. The High Court dismissed the petition but granted a certificate under Art 132 of the Constitution, and the appeal is now before us.

Art 164(4) reads as follows

“164(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.”

The appellant contends that this clause only applies when a Minister, who is a Member of the Legislature of the State, loses his seat and the idea behind cl (4) of Art 164 is to give him a period of six months to get himself re-elected. The learned Counsel for the respondent, *Mr Singhi*, contends that the scope of cl (4) cannot be whittled down in this manner as there is no warrant in the language of the Article. He further says that even in England a person can be a Minister without being a Member of the House of Commons or the House of Lords. He further points out that a number of Constitutions contain similar provisions.

It seems to us that cl (4) of Art 164 must be interpreted in the context of Arts 163 and 164 of the Constitution. Art 163(1) provides that “there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of

his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion" Under cl (1) of Art 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister They all hold office during the pleasure of the Governor Clause (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Minister, but cl (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State This is the only condition that the Constitution prescribes in this behalf.

The appellant says that if the interpretation put by the High Court is correct it would be possible for a Governor to appoint a Chief Minister and Ministers none of whom are Members of the State Legislature He said that this could not have been contemplated. But if the Legislative Assembly of the State to whom this Council of Ministers would be collectively responsible endorses this unlikely Council of Ministers there is nothing in the Constitution which would make this appointment illegal

The appellant drew our attention to Art 175 in which it is provided that "the Governor may address the Legislative Assembly or, in the case of a State having a Legislative Council, either House of the Legislature of the State, or both Houses assembled together, and may for that purpose require the attendance of Members" He said that it would be rather strange that the Ministers, who were not members of either the Legislative Assembly or the Legislative Council would not be present But it seems to us that by virtue of Art 177 the Ministers, even if they are not members

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of a Legislative Assembly or Legislative Council would be entitled to be present at such a meeting

It seems to us that in the context of the other provisions of the Constitution referred to above there is no reason why the plain words of cl (4) of Art 164 should be cut down in any manner and confined to a case where a Minister loses for some reason his seat in the Legislature of the State. We are assured that the meaning we have given to cl (4) of Art 164 is the correct one from the proceedings of the Constituent Assembly and the position as it obtains in England, Australia and South Africa.

An amendment (1) was proposed in the Constituent Assembly that the following be substituted

"A Minister shall, at the time of his being chosen as such, be a member of the Legislative Assembly or Legislative Council of the States as the case may be"

This amendment was, however, negatived

It is interesting to note the position in England. According to Jennings (2)

"It is a well-settled convention that these ministers should be either peers or members of the House of Commons. There have been occasional exceptions. Mr Gladstone once held office out of Parliament for nine months. The Scottish law officers sometimes, as in 1923 and 1924, are not in Parliament. General Smuts was minister without portfolio and a member of the War Cabinet from 1916 until 1918. Mr Ramsay MacDonald and Mr Malcolm MacDonald were members of the Cabinet though not in Parliament from the general election of November 1935 until early in 1936"

(1) Constituent Assembly Debates dated June 1, 1949 Official Report Vol VIII p 521  
 (2) Cabinet Government by Jennings—third edition, page 60

"The House of Commons is, however, critical of such exceptions"

S 64 of the Commonwealth of Australia Constitution Act *inter alia* provides that "after the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives" Commenting on this QUICK and GARRANT (1) state as follows

"The appointment of a Federal Ministry will necessarily precede the election of the first Federal Parliament. There must be a Ministry to assist and advise the Governor-General in the performance of Executive Acts essential for the conduct of the first general election. The first Federal Ministry cannot at their appointment be members of the Federal Parliament, because at the time of their appointment there is no such Parliament in existence. After the first general election however, no Federal Minister is permitted to hold office for a longer period than three months, unless he is or becomes a senator or a member of the House of Representatives

S 32 of the Constitution Act of South Australia (4th January, 1856) contained a similar provision, viz, that after the first general election of the South Australian Parliament, no person should hold the offices of Chief Secretary, Attorney-general, Treasurer, Commissioner of Crown Lands and Immigration, or Commissioner of Public Works, for more than three calendar months, unless he should be a member of the Legislative Council or House of Assembly"

(1) "Annotated Constitution of the Australian Commonwealth" by Quick & Garran, p 711.

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This shows that Art 164(4) has an ancient lineage  
 S 14(1) of the South Africa Act, 1909 reads thus:

"The Governor-General may appoint officers not exceeding (twelve) in number to administer such departments of State of the Union as the Governor-General in Council may establish, such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's ministers of State for the Union. After the first general election of members of the House of Assembly, as hereinafter provide, no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament."

HAHLO and KAHN (2) state thus:

"The rule of responsible government that Ministers must be Members of Parliament is ensured by the statutory requirement that they be or within three months become members of either House."

In the result the appeal fails and is dismissed. There will be no order as to costs.

*Appeal dismissed*

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(2) The British Commonwealth— "The Development of its Laws and Constitutions" by Hahlo & Kahn (Vol 5, p 150),



## SUPREME COURT

## APPELLATE CIVIL

Before Mr. Justice C A Vaidialingam and Mr. Justice  
A N Ray

AZMAT AZIM KHAN

.. APPELLANT,

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April, 21

BOARD OF REVENUE, U. P AND

OTHERS

... RESPONDENTS

**U. P. Encumbered Estates Act, 1934, ss. 23-A and 23-B—**  
*U. P. Zamindari Abolition and Land Reforms Act, 1950,*  
*s. 70 and U P Zamindari Abolition and Land Reforms*  
*Rules, r. 77—Judgment debtor cannot take away com-*  
*penensation money or bonds*

Ss 23-A and 23-B of the 1934 Act requires that the amount of the bonds on account of compensation or rehabilitation grant received by the Collector shall be expended or utilised by the Collector in liquidation of the amount of the secured debt. Under s. 23-B of the 1934 Act the bonds are received by the Collector in pursuance of the requisition under s. 23-A of the 1934 Act. The absence of the service of a requisition cannot confer a right on the judgment-debtor to take away the compensation money or bonds.

*Held* that the Board of Revenue rightly gave directions to the Compensation Officer to hand over the bonds reported to be remaining with him for the liquidation of debts to secure compliance with the provisions of the statute and performance of statutory duty by the Collector as well as the Compensation Officer and the appellants were not entitled to receive the bonds without satisfying the decree.

Civil Appeal No 2108 of 1966 from the Judgment and Decree dated the 15th January, 1965 of the Allahabad High Court, Lucknow Bench in Special Appeal No 82 of 1963

*Danial A Latif* (M I Khowaja with him), for the Appellant

*C B Agarwala* (Akhtar Husain with him), for the Respondent no 3

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RAY, J —This appeal is by certificate from the judgment dated 15th January, 1965 of the Allahabad High Court

The appellant, son of Sardar Mujibul Rehman Khan, a zamindar of a number of villages in the district of Kheri, Uttar Pradesh impeached the orders of the Board of Revenue of Uttar Pradesh dated 30th August, 1960 and 6th September, 1960 whereby the Board issued three directions. The first was to stop payment of instalment money on the bonds by the treasuries. The second was to direct the Compensation Officer to hand over bonds of the face value of Rs 32,000 reported to be remaining with him for liquidation of debts. The third was an order attaching moveable and immoveable properties belonging to the appellant and his brother for liquidation of debts.

The principal question in this appeal is whether the first respondent, the Board of Revenue, Uttar Pradesh had authority to pass the order impugned in this appeal.

The third respondent Raja Shatranjai the decree-holder was a creditor of the appellant's father Sardar Mujibul Rahman Khan on the basis of a mortgage deed. Raja Shatranjai obtained a decree on the said mortgage debt for Rs 1,31,040-1-0 and Rs 1931-1-0 as costs. The decree is dated 28th September, 1939. The decree was passed under the provisions of the U P Encumbered Estates Act, 1934 (hereinafter referred to as the 1934 Act). The decree was passed on the application of Sardar Mujibul Rehman Khan under s 4 of the 1934 Act for the liquidation of his debts. The debtor was a zamindar in the district of Lakhimpur-Kheri. The decree was transferred to the Deputy Commissioner of Kheri for liquidation of debts.

Meanwhile the U P Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the 1950

Act) came into force. The proprietary rights of the intermediaries vested in the State Government and the intermediaries were entitled to receive compensation in lieu thereof. The judgment-debtor was an intermediary. Notices were issued to the intermediaries to take delivery of the bonds or receive payment in cash on specified dates. The appellant on the death of his father became entitled to two-third of the zamindari property and compensation thereof. He took delivery of the compensation bonds of the value of Rs 42,750 from the Compensation Officer, Lakhimpur while bonds of the value of Rs 21,250 were received by his brother Hikmat Hakim Khan. The total amount of bonds received by the appellant and his brother aggregated Rs 64,000.

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On 14th April, 1959 the decree-holder applied to the Collector, Kheri for an order that the appellant and his brother to return the bonds which they had received from the Compensation Officer failing which their moveable and immovable properties to the extent of these bonds be attached for liquidation of their debts. The Collector on 17th August, 1959 rejected the application. The decree-holder preferred an appeal. The appeal was dismissed by the Additional Commissioner, Lucknow on 17th February, 1960. The decree-holder thereupon commenced revision proceedings before the Board of Revenue. On 30th August, 1960 a member of the Board of Revenue allowed the revision. On 6th September, 1960, another member of the Board of Revenue concurred in the order. The Board asked the Collector to take one or other of the three steps, namely, the treasuries to stop payment of money on instalment in respect of the compensation bonds or direct the Compensation Officer to hand over bonds of the face value of Rs 32,000 reported to be remaining with him for the

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liquidation of the debts or to attach the moveable properties of the appellant and his brother for the liquidation of debts.

The appellant thereafter made an application to the High Court under Art 226 of the Constitution for an order quashing the order and directions of the Board of Revenues. The learned single Judge quashed the order of the Board of Revenue save and except the direction directing the Compensation Officer to hand over bonds of the face value Rs.32,000 reported to be remaining with him for liquidation of debts.

Thereafter the decree-holder preferred an appeal. The Bench of the High Court was divided in their opinion. The matter was placed before the third learned single Judge. The order of the High Court was that direction no 3 of the Board of Revenue, namely, attachment of moveable and immoveable properties of the appellant and his brother was quashed. The High Court upheld the other two orders of the Board of Revenue in regard to stoppage of payment of instalment money on the bonds by the treasuries and direction on the Compensation Officer to hand over the bonds of the face value of Rs 32,000 remaining with him for liquidation of the debts.

Counsel for the appellant contended that the Board of Revenue did not have any power to issue the directions. In the present case, the decree was passed under s 14 of the 1934 Act. Under s 19 of the 1931 Act the Special Judge passing the decree is to send the same to the Collector for execution in accordance with the provisions of Chap V of the 1931 Act. The Special Judge under s 19 of the 1934 Act is also to inform the Collector of the nature and extent of the amount of the secured debt which is not legally recoverable otherwise than out of the compensation and rehabilitation grants.

payable to the landlord in respect of the mortgaged estate The U P Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the 1950 Act) came into force on 26th January, 1951 As a result of the 1950 Act ss. 23-A and 23-B were introduced into the 1934 Act S 23-A speaks of compensation and rehabilitation grant to be placed at the disposal of the Collector S. 23-B speaks of liquidation of secured debts recoverable both from compensation and rehabilitation grant The sections are set out hereunder

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*"23-A Compensation and rehabilitation grant to be placed at the disposal of the Collector—The Collector shall require the Compensation Officer and Rehabilitation Grants Officer as may be necessary to place at his disposal in pursuance of s 70 of the U P Zamindari Abolition and Land Reforms Act, 1950, the amount of compensation money and rehabilitation grant payable to the landlord in respect of his proprietary rights in land reported to be liable to attachment or sale under the provisions of sub-s (2) of s 19*

*23-B Liquidation of secured debt recoverable from compensation and rehabilitation grant—(1) Without prejudice to the provisions of s 8 of the U P Zamindar's Debt Reduction Act, 1952, the amount or the bonds on account of compensation or rehabilitation grant received by the Collector in pursuance of the requisition under s 23-A shall be expended or utilised by the Collector in liquidation of the amount of the secured debt which having regard to the provisions of the U P Zamindar's Debt Reduction Act, 1952 was secured on the proprietary rights in land in respect of which such money has been received*

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(2) If any balance out of the compensation and rehabilitation grant received by the Collector in pursuance of the requisition under s 23-A remains in the hands of the Collector after utilising the same in accordance with the provisions of sub-s (1), such balance shall be utilised by the Collector in discharging the debts, other than the debts, referred to in the said sub-section in order of priority”

Both these sections of the 1934 Act refer to s 70 of the 1950 Act. S 70 of the said Act is as follows.

*“Compensation money to be placed at the disposal of the Court or authority—Where before any Court or authority any suit or proceeding is pending which directly or indirectly affects or is likely to affect the right of any person to receive the whole or part of the compensation determined under Chap III, the Court or authority may require the Compensation Officer to place at its disposal the amount so payable and thereupon the same shall be disposed of in accordance with the orders of such Court or authority”*

The Collector, therefore, by reason of the provisions of the 1934 Act and the 1950 Act requires the Compensation Officer and the Rehabilitation Officer to place the amount of compensation at his disposal. The Collector on receipt of the grant is to expend or utilise the same in liquidation of the amount of the secured debt and if the balance remains it is to be utilised in discharging the debts other than those mentioned in s 23-B(1) of the 1934 Act, in order of priority.

By reason of the provisions contained in s 70 of the 1950 Act and s 23-A of the 1934 Act the compensation money is sent for by the Collector for the purpose of liquidation of secured debts on which decree is passed. The Compensation Officer under r 77(1) of the Zamin-

dari Abolition and Land Reforms Rules, 1952 could issue notice to the intermediary directing him to take delivery of the bonds. The issue of a notice would not clothe the intermediary with the right to take away the bonds because under s 18 of the 1934 Act the decree-holder becomes entitled to recover the amount of the decree in the manner and to the extent mentioned in the 1934 Act. The proviso to s 18 of the 1934 Act enacts that the secured debt shall be recoverable from the compensation and rehabilitation grants as though the security had not been extinguished. The question, in the present case, is whether the appellant could lawfully obtain delivery of the bonds from the Compensation Officer. Ss 23-A and 23-B of the 1934 Act require that the amount or the bonds on account of compensation or rehabilitation grant received by the Collector shall be expended or utilised by the Collector in liquidation of the amount of the secured debt. Under s 23-B of the 1934 Act the bonds are received by the Collector in pursuance of the requisition under s 23-A of the 1934 Act. The absence of the service of a requisition cannot confer a right on the judgment-debtor to take away the compensation money or bonds. The principle is *actus curia neminem gravabit*.

The decree-holder under the provisions of the relevant statutes was entitled to be paid out of the compensation grant monies in satisfaction of the decree. If the Collector had required the Compensation Officer under s 23-A of the 1934 Act to place at his disposal pursuant to s 70 of the 1950 Act the compensation money, the bonds could not have been taken delivery of by the appellant. The Board of Revenue rightly gave the directions to secure compliance with the provisions of the statute and performance of statutory

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duty by the Collector as well as the Compensation Officer. The appellants were not entitled to receive the bonds without satisfying the decree. The appellants were wrong in doing so. The appellant could not take advantage of his own wrong. That is why the Board of Revenue correctly directed the stoppage by the treasuries of payment of instalment money on the bonds. The other direction by the Board of Revenue requiring the Compensation Officer to hand over the bonds remaining with the Compensation Officer was in aid of valid compliance with ss 23-A and 23-B of the 1934 Act as well as s 70 of the 1950 Act.

The jurisdiction and authority of the Board of Revenue in the present appeal touched directly on the performance of statutory obligations by statutory authorities. The compensation bonds are required by the statutes to go to the Collector for liquidation of secured debts. The judgment debtor is not entitled to the compensation bonds without liquidation of the debts in accordance with the provisions of the statute.

The High Court rightly upheld the directions of the Board of Revenue. The appeal is therefore dismissed. The parties will pay and bear their own costs in this Court.

*Appeal dismissed*

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## SUPREME COURT

## APPELLATE CIVIL

*Before Mr. Justice K S. Hegde and  
Mr Justice A N Grover*

STATE OF U P AND ANOTHER APPELLANTS,

*v.*

MURARI LAL & BROTHERS RESPONDENT  
LTD

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August, 3

**Contract Act, 1872, s 230(3)—Contract void and unenforceable.**

Where the contract was entered into without complying with the requirements of Art 299(1) of the Constitution the question of ratification could not arise because on the view which has already been followed such a contract is void and is not capable of ratification.

Civil Appeal No 15 of 1968 from the Judgment and Decree dated the 11th August, 1964 of the Allahabad High Court in First Appeal No 11 of 1957

*C B Agarwala (O P Rana and R Rana with him),*  
for the Appellants

*S P Sinha (O P Gupta and M I Khowaja with him),*  
for the Respondent

GROVER, J —This is an appeal by certificate from the judgment of the Allahabad High Court decreeing the suit filed by the respondent company for recovery of a sum of Rs 21,000 on account of rent or damages in respect of storage charges for 4,000 maunds of potatoes for which space had been reserved in the cold storage by the company

The plaintiff respondent brought a suit against the State of Uttar Pradesh and impleaded three other defendants who were, at the material time, in the service of the State Defendant no 3 was a Horticulturist in the Department of Agriculture. He negotiated with the plaintiff for storing Government potatoes in a cold

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storage which belonged to the plaintiff. It was agreed that the Government potatoes would be sent for storage and the plaintiff would be entitled to charge at a certain rate per maund. It was understood that 4,000 maunds of potatoes would be sent for storage. However, no potatoes were sent although the plaintiff had reserved the requisite space in the storage which remained unoccupied during the season. It appears that defendant no 3 A. P. Gupta was acting on behalf of Srivastava defendant no 2 who was Deputy Director, Horticulture. Both these defendants were acting upon instructions from Sri Ram Krishna defendant no 4 who was Assistant Development Commissioner, Planning, Lucknow. The suit was therefore filed against the State and the other three defendants to recover the storage charges amounting to Rs 21,000.

Although all the defendants raised a common plea that there was no contract between the parties for the storage of potatoes and that the entire matter remained at the stage of negotiations the real plea taken on behalf of the State was that no contract had been entered into in accordance with Art 299(1) of the Constitution. The trial court upheld the objection of the State and dismissed the suit against it but it held the other defendants jointly liable for the storage charges. The High Court on appeal by the defendants set aside the decree against defendants nos 2 and 4 but maintained it against defendant no 3. No appeal, however, was filed by the plaintiff against the State. As the judgment of the High Court proceeded mainly on the provisions of sub-s (3) of s 230 of the Contract Act the whole of that section may be set out.

"S 230 In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them,

Such a contract shall be presumed to exist in the following cases

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal,

(3) where the principal, though disclosed, cannot be sued "

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According to the High Court the entire transaction had been entered into by the defendant on behalf of the Government. As the State Government was not liable by virtue of Art 299 of the Constitution s 230(3) would be applicable and defendant no 3, who was apparently acting as an agent of the State Government, would become personally liable under the contract. Certain observations in *Chaturbhuj Vithaldas Jasani v Moreshwar Parashram* (1) appear to lend support to this view. In that case also no formal contract had been entered into as required by Art 299(1) of the Constitution. The Court observed that the Chairman of the Board of Administration had acted on behalf of the Union Government and his authority to contract in that capacity had not been questioned. Both sides acted in the belief and on the assumption that the goods were intended for Government purposes. The only flaw was that the contracts were not in proper form and because of this technical difficulty the principal could not have been sued. But that was just the kind of case that s. 230 (3) of the Indian Contract Act was designed to meet. The Government might not be bound by the contract but it was very difficult to say that such contracts were void and of no effect. There would be nothing to prevent ratification especially if that was for the benefit of the Government. However, in a subsequent decision in

(1) 1951 S.C.R. 817

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*State of West Bengal v Messrs B K Mondal and Sons*  
(1), GAJENDRAGADKAR, J, as he then was, delivering the majority judgment of the Constitution Bench said at p 885 with reference to the above observation:

"The contract which is void may not be capable of ratification, but, since according to the Court the contract in question could have been ratified it was not void in that technical sense. That is all that was intended by the observation in question. We are not prepared to read the said observation or the final decision on the case of *Chattubhu* (2) as supporting the proposition that notwithstanding the failure of the parties to comply with Art. 299(1) the contract would not be invalid. Indeed, BOSE, J, has expressly stated that such a contract cannot be enforced against the Government and is not binding on it."

The effect of the reference to s 230(3) of the Contract Act in *Chattubhu*'s case (2) was not directly considered but in a large number of subsequent decisions this Court has taken the view that the provisions of Art. 299(1) [corresponding to s 175(3) of the Government of India Act, 1935] are mandatory and contain a prohibition against a contract being entered into except in the manner prescribed by the aforesaid provisions. We need only refer to the recent judgment in *Mulamchand v State of Madhya Pradesh* (3). After referring to the earlier decisions RAMASWAMI, J observed at page 221:

"The principle is that the provisions of s 175(3) of the Government of India Act, 1935 or the corresponding provisions of Art. 299(1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the

(1) (1962) Supp 1 S C R 876  
(3) (1970) 3 S C R. 214

(2) (1954) S C R 817.

contracts and makes them void. 'There is no question of estoppel or ratification in such a case.'

It is clear that the observations in *Chatturbhuj* case (1) have not been regarded either as not laying down the law correctly or as being confined to facts of that case. The consensus of opinion is that a contract entered into without complying with the conditions laid down in Art. 299(1) is void. If there is no contract in the eye of the law it is difficult to see how s 230(3) of the Contract Act would become applicable.

Although the High Court did not rely on s 235 of the Contract Act the trial court had held that the defendants had no authority to enter into a contract on behalf of the State Government but still they purported to do so. There was an implied warranty of authority which had to be presumed and the plaintiff was entitled to receive compensation for breach of that warranty under s. 235 of the Contract Act. S 235 provides that a person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing. The High Court did not base its decision on the above section. But it seems that s 235 also can become applicable only if there is a valid contract in existence. This appears to follow from the words "if his alleged employer does not ratify his acts". The contract should thus be such that it is capable of ratification. In the present case where the contract was entered into without complying with the requirements of Art. 299 (1) of the Constitution the question of ratification could not arise because on the view which has already been followed such a contract is void and is not capable of

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ratification. However, we do not wish to express any final opinion on the applicability of s 235 of the Contract Act to cases where the contract suffers from the infirmity that the requirements of Art. 299(1) of the Constitution have not been complied with. The reason is that before the High Court no contention appears to have been advanced on behalf of the plaintiff based on s 235 of the Contract Act nor has the plaintiff's Counsel chosen to satisfy us that even if s. 230(3) was not applicable the decree should be sustained on the ground that relief could be granted by virtue of s 235 of the Contract Act.

The appeal thus succeeds and the judgment and decree of the courts below are hereby set aside and the suit of the plaintiff is dismissed. In the circumstances of the case the parties are left to bear their own costs throughout.

*Appeal allowed*

## SUPREME COURT

### APPELLATE CIVIL

*Before Mr Justice C A Vaidialingam and  
 Mr Justice P Jaganmohan Reddy*

SITA RAM GOEL

APPELLANT,

*v*

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SUKHNANDI DAYAL AND ANOTHER

RESPONDENTS

Code of Civil Procedure, 1908, O XXI, r 2 and s 47 (2)—  
*Application for execution of decree—Objections made under  
 O XXI, r 2(2) by judgment-debtor—Court can treat the latter  
 as suit*

Where in answer to the execution petition the judgment-debtor filed objections by initiating proceedings under O, XXI, 1 2(2), C P C and the parties and the Court had proceeded on the basis that the entire question related to a controversy in respect of execution, discharge and/or satisfaction of the decree, *held* that the Court had under s 47(2) power to treat the said proceedings as a suit.

——, O, 43, 1 1, cl (4) and s 105 (2)—*Order of remand by appellate Court.—No appeal preferred against it.—Finding of trial court after remand order becomes final*

Under O 43, 1 1, cl (4), C P C an appeal lies against an order remanding a case where an appeal would lie from the decree of the appellate court

Where it is clear that the respondent should have filed an appeal against the decision given after remand becomes final and its correctness cannot be disputed subsequently

Civil Appeal No 1970 of 1969 from the judgment and order dated the 21st January, 1969 of the Allahabad High Court, in Execution Second Appeal No 270 of 1963.

*Appellant in person*

*E C Agrawala, A T M Sampath and S R Agarwal, for the Respondents*

VAIDIALINGAM, J —The appellant in this appeal, by special leave, has argued his case in person and attacks the judgment of the Allahabad High Court dated 21st January, 1969 reversing the decrees of the two Subordinate Courts

The facts leading up to this appeal may be briefly stated. The respondent, who is the landlord, under whom the appellant is a tenant, obtained an *ex parte* decree on 9th March, 1957 in Suit No 74 of 1956 in the Court of the Additional Munsif, Kanpur. The decree was not only for eviction, but also for payment of rent or damages and mesne profits, as well as costs.

The appellant pleaded that there was a compromise entered into between him and the respondent in and by which the manner of extinguishment of the decree was arrived at. That compromise, according to the

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appellant, was entered into on 25th July, 1957. The terms of the compromise have been incorporated in the Judgment of the Additional District Judge dated 27th March, 1961 in Misc Civil Appeal No 688 of 1960 and in other proceedings, and it is unnecessary for us to refer to them. It is enough to note that if the amounts agreed to be paid as per its terms, were paid the decree for eviction would stand extinguished retrospectively.

The plea of the appellant was that he has made the payments in accordance with the compromise and the last of such payments was on 16th June, 1960. As noted earlier, according to him, the date of the compromise was 25th July, 1957. It was his claim that when the last payment was made, the decree for eviction obtained against him on 9th March, 1957 stood extinguished and that the landlord-respondent has no further right to execute the decree.

The landlord had filed an application on 19th July, 1960 for executing the decree in Suit No 74 of 1956. Prior to that, the appellant appears to have taken certain proceedings and asked for stay of execution till the disposal of some criminal case and also for adjustment of payments.

We are more particularly concerned with the application filed by the appellant on 3rd September, 1960, before the Trial Court. That application was under O XXI, r 2(2), C P C. In that application, the appellant, after referring to the compromise and the various payments, claimed to have been made by him under the compromise prayed for recording an adjustment of the decree. This application was opposed by the respondent on three grounds: (a) There has been no compromise, (b) There has been no payment, and (c) The application under O XXI, r 2 is barred by



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These contentions of the appellant as seen from the judgment, were very strenuously contested by the respondent who pleaded that the application filed under O XXI, r 2 was barred, as correctly held by the executing court on the basis that the limitation starts from 25th July, 1957. The respondent pleaded that the appellant had sufficient opportunity to lead evidence both regarding the truth about the factum of compromise as well as regarding the payments claimed to have been made by him. As this opportunity was not availed of by the appellant, the landlord pleaded that the appeal should be dismissed.

The learned District Judge by his judgment and order dated 27th March, 1961, after referring to the contentions of the parties, as well as the terms of the compromise pleaded by the appellant, considered the main question as to from what date the period of limitation is to be computed. The learned Judge before whom case law was cited on both sides with regard to the starting point for limitation, ultimately accepted the contention of the appellant that if he is able to establish that he has made the last payment, on 16th June, 1960, the period of limitation of three months for filing an application under O XXI, r. 2 would begin to run only from that date, and that in that case the application filed on 3rd September, 1960 will be in time. The learned Judge categorically rejected the contention of the respondent-decree-holder supporting the view of the trial Court that limitation has begun to run from 25th July, 1957. In fact the trial court could not have held otherwise, in view of the decision of the District Court in Misc Civil Appeal No 688 of 1960.

After holding that the limitation will start only from 16th June, 1960, the learned Judge, however, adverted

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as the Munsif was bound by the remand order. By judgment and order dated 28th September, 1961, the learned Munsif accepted the plea of the appellant both regarding the truth of the compromise as well as the payments stated to have been made by him. In particular, though there was a serious controversy between the parties regarding the payment stated to have been made by the appellant on 16th June, 1960, the learned Munsif, on the evidence, accepted the appellant's case and held in his favour on this point. In view of this finding regarding payment on 16th June, 1960, in favour of the judgment-debtor, the period of limitation was computed by the Munsif from that date, as directed by the remand order of the District Judge, and held that the application filed by the judgment-debtor was within time. In this view, the learned Munsif ordered full adjustment and satisfaction of the decree as well as cost and further held that the decree got extinguished as pleaded by the judgment-debtor.

The respondent filed an appeal before the I Additional Civil Judge challenging the judgment and order of the trial court dated 28th September, 1961. The learned Civil Judge by his judgment dated 29th October, 1962, confirmed the findings of the trial court and dismissed the respondent's appeal.

The respondent-decree-holder filed Second Appeal No. 270 of 1963 before the High Court. The learned Judge has not adverted to the proceedings referred to above leading up to the order of remand and the directions given in Misc. Civil Appeal No. 688 of 1960. On the other hand, the learned Judge has proceeded on the basis as if the decision in this case was rendered for the first time by the Munsif on 28th September, 1961 and by the Civil Judge on the 20th October, 1962. In view of this, the learned Judge merely noted

that the two subordinate courts have concurrently accepted the case of the appellant, both on the question of compromise, as well as the payments claimed to have been made by him. The learned Judge has also noted that the claim of the judgment-debtor that he paid Rs 235 on 16th June, 1960, has been concurrently accepted by both the courts.

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After noting the above findings recorded concurrently by both the courts, the High Court does not express any disagreement with those findings. But on the basis of those findings, the High Court considered the question whether, in the nature of the compromise pleaded by the appellant and found in his favour by the two courts, an application under O 21, r 2, C P C was maintainable. In this connection the High Court referred to the provisions of O 21, r 1, C P C as amended and in force in Allahabad. After quoting that rule, the High Court is of the view that as the appellant has not claimed to have made payments in compliance with those provisions, it was not open to him to ask for recording adjustment of the decree. According to the High Court, his remedy, if any, is only by way of a separate suit for damages against the decree-holder. It is the further view of the High Court that this aspect has not been considered at all by the two courts and as such they committed an error in investigating the question regarding the truth or otherwise of the compromise or payments claimed to have been made in pursuance of the said compromise, particularly the payments made on 16th June, 1960. The High Court then refers to the stand taken by the decree-holder that even on the basis of the compromise, the period of limitation for filing an application for recording adjustment of the decree commences from 25th July, 1957 as also the plea of the appellant that limitation com-

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mences from 16th June, 1960, when the last payment was made. The High Court expressed the view that the agreement pleaded could amount to an adjustment of the decree only if the said agreement was in writing and had been filed within the period allowed by the law of limitation. The High Court has not pursued the matter further and expressed an opinion as to what is the date from which the period of limitation is to be computed. In the end the High Court expressed the view that the whole approach made by the two subordinate courts is erroneous. Obviously, this criticism must refer to the circumstances noted by the High Court that the payments under the compromise have not been claimed to have been made in the manner provided in O 21, r 1, C P C as in force in Allahabad. On this reasoning the High Court reversed the decrees of both the subordinate courts and dismissed the application of the appellant filed under O 21, r 2, C P C. It will be noted that even before the High Court the respondent had not taken any objection that the appeal filed by the judgment-debtor, namely, Miscellaneous Civil Appeal no. 688 of 1960 was not maintainable and that the findings recorded wherein against him are not binding on him.

The appellant urged before us that the High Court was not justified in interfering with the concurrent findings of facts and that it committed an error in going behind the findings recorded in the Miscellaneous Civil Appeal no. 688 of 1960. He further urged that the question as to from what date the period of limitation is to be computed has already been adjudicated upon in the said appeal, and that the decree-holder should not have been permitted to raise over again the point concluded by the remand order. The appellant also urged that the view of the High Court that the

payments have not been made by him in accordance with O 21, 1 1, C P C is wrong

Mr. *E C Agarwala*, learned counsel for the respondent-decree-holder has drawn our attention to O 21, 1 1, C P C as in force in Allahabad. He contended that even according to the appellant the payments have not been made in accordance with the said rule. I heretofore, he urged that the High Court was perfectly justified in holding that the payments which have not been made in accordance with the said rule, cannot be taken into account for recording adjustment of the decree.

In the view that we take that because of the decision in Miscellaneous Civil Appeal no 688 of 1960 it is not open to the respondent to raise the objection either of limitation or that the payments have not been made as per the said rule, we express no opinion whether the payments made directly to the decree-holder under the specific terms of an agreement or a compromise cannot be pleaded in an application filed by for recording satisfaction or adjustment and whether under those circumstances such payment should also be made in the manner provided in the said rule.

One aspect which strikes us and which will conclude the case against the respondent is the finding recorded by the learned District Judge on 27th March, 1961 in Miscellaneous Civil Appeal No 688 of 1960. We have already referred to the nature of the findings recorded therein. The executing court had dismissed the application filed by the appellant on the ground that it is barred by limitation as it has been filed beyond 90 days from 25th July, 1957. Before the District Judge parties were at issue on this aspect. While according to the appellant, limitation starts only from 16th June, 1960, the respondent's plea was that limitation commences

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from 25th July, 1957. Various decisions were cited by both the parties before the District Court. After a consideration of those decisions, the District Court specifically held that if the appellant is able to establish the compromise as well as the further fact that he paid the last instalment on 16th June, 1960, the application is not barred by limitation as it has been filed within 90 days, namely on 3rd September, 1960. Though the respondent pleaded that the appellant had an opportunity to lead evidence regarding the truth of the compromise as well as the payments claimed to have been made by him, the District Court took the view that the learned Munsif had no occasion to consider these aspects as he dismissed the application filed by the appellant on the sole ground of limitation. After specifically recording the date from which period of limitation is to be computed, the learned District Judge remanded the proceedings to the trial court for investigation into the truth of the compromise as well as the payments claimed to have been made by the appellant. The District Munsif, after remand has elaborately gone into the matter and specifically found on fact in favour of the appellant, both regarding the truth of the compromise and the payments. He also held that the last payment has been made on 16th June, 1960, and, therefore, in view of the directions contained in the remand order, the application filed by the appellant was within time.

It is against this order of the District Munsif that the respondent filed an appeal before the District Court and a further second appeal before the High Court. We have already stated that the respondent had filed on 19th July, 1960 an application for executing the *ex parte* decree. It is in answer to that execution petition that the appellant filed objections by initiating pro-



ceedings under O 21, r 2(2), C P C on 31st September, 1960. Therefore, the parties and the Courts had proceeded on the basis that the entire question related to a controversy in respect of execution, discharge or satisfaction of the decree. Under s 47(2), C P C the Court has power to treat the said proceeding as a suit. That explains why the respondent did not raise any objection before the District Court that Miscellaneous Civil Appeal No 688 of 1960 filed by the appellant was not maintainable. We have already pointed out that before the District Court the respondent did not also raise any objection that no investigation regarding the truth of the compromise and the payment is necessary as the amount, even according to the appellant, has been paid contrary to O 21, r 1, C P C as in force in Allahabad.

In view of the circumstances pointed out above, in our opinion, the decision of the Additional District Judge in Miscellaneous Civil Appeal No 688 of 1960 precludes the respondent from re-agitating the point covered by that decision.

Mr *Agarwala* pointed out that Miscellaneous Civil Appeal No 688 of 1960 was not maintainable. We are not impressed with this contention because apart from the fact that no such objection was raised before the District Court, which was dealing with the said appeal, the respondent himself has filed the appeal and the second appeal against the order passed by the District Munsif after remand. It was against the original order of the District Munsif that the appeal was filed by the appellant before the District Court.

Even otherwise, as we have already pointed out, the proceedings have been treated as one under s 47, C P C in which the Miscellaneous Civil Appeal No 688 of 1960 was perfectly competent. Under O 41, r 23, an appellate court has got power to remand the proceed-

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ings when a suit has been disposed of on a preliminary point. We have already pointed out that the District Munsif dismissed the application filed by the appellant on the preliminary ground that it is barred by limitation. We have already further pointed out that it must be considered to be a proceeding under s 47 as it was really in opposition to the execution proceedings filed by the respondent. The appellate court, under those circumstances, when it disagreed with the trial court on the question of limitation was perfectly competent to remand the proceedings. Under O 43, r 1, cl (u), C.P.C. an appeal lies against an order remanding a case where an appeal would lie from the decree of the appellate court. From the fact that the respondent has filed second appeal, which is the subject of attack before us against the decision in an appeal of the District Court in the same proceedings. It is clear that the respondent should have filed an appeal against the order of remand.

The consequence of an omission to file an appeal against the order of remand, under such circumstances, is indicated in s 105, sub-s (2), C.P.C. which is as follows.

“S 105(2) Notwithstanding anything contained in sub-s (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness”

We have already pointed out that the respondent had a right of appeal against the judgment and order passed in Miscellaneous Civil Appeal No 688 of 1960. The respondent admittedly did not file an appeal against the said order of remand. If so, it follows that the decision in Miscellaneous Civil Appeal No 688 of 1960

regarding the date from which the period of limitation is to commence, namely, 16th June, 1960, if payment on that date is established by the appellant binds both the parties, as that decision has become final. It is on the basis of that decision that the trial court went into the facts and held in favour of the appellant. Those findings have been confirmed by the District Court on 20th October, 1962. It was against the fresh decision given by the District Munsif on 28th September, 1961 and confirmed by the District Court on 20th December, 1962 that the present second appeal was filed before the High Court by the respondent. The High Court when dealing with the matter should have given due effect to the decision given in the order of remand in Miscellaneous Civil Appeal No. 688 of 1960 and should have held that the respondent is precluded from raising either the plea of limitation or that it was not open to the appellant to rely upon the payments not made in accordance with O. 21, r. 1, C.P.C. as in force in Allahabad. The High Court has committed a very serious error in law in not advertent to the remand order as well as to the various other circumstances mentioned by us earlier.

We have already pointed out that the High Court has not differed from the concurrent findings recorded on facts in favour of the appellant. The interference by the High Court with the decision of the two subordinate courts is erroneous in law.

In the result, the decree and judgment of the High Court dated 21st January, 1969 in Second Appeal No. 270 of 1963 are set aside and this appeal is allowed. There will be no order as to costs.

*Appeal allowed*

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DAYAL

## SUPREME COURT

## APPELLATE CIVIL

Before Mr Justice K S Hegde and Mr Justice  
A N. Grover

1971  
December, 2

ROHINI KUMARI

... APPELLANT,

v.

NARENDRA SINGH

RESPONDENT

**Hindu Marriage Act, 1955, s 10(1)(a) read with Explanation—  
Decree for judicial separation—Desertion for two years—  
Desertion includes wilful neglect**

Under s 10(1)(a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage.

Where the wife had left her husband's home in 1947 and thereafter consistently refused to return to her husband notwithstanding the fact that she had been properly treated when she lived with him and the subsequent marriage of the husband with another woman had no impact on the wife held that the wife had left originally with the object of bringing cohabitation to an end and the desertion on her part continued throughout without any reasonable cause.

Civil Appeal No 35 of 1971 from the judgment and order, dated the 5th October, 1968 of the Allahabad High Court in Second Appeal No 1508 of 1966

S K Gambhir and S K Dhingra, for the Appellant  
C K Daphtary (J B Dadachanji and S S Shukla  
with him), for the Respondent

GROVER, J.—This is an appeal from the judgment of the Allahabad High Court wherein special leave was granted limited to the question of law as to the interpretation of s. 10(1) (a) read with the Explanation of

the Hindu Marriage Act, 1955, hereinafter called the 'Act'.

The undisputed facts are that the parties got married in 1945 and in February, 1947 the wife went to Alhrajpur her parental home. She never returned thereafter. In 1953 the husband, who was a member of the Indian Foreign Service met a Dutch lady, Countess Rita while he was posted abroad. He married her only a day before the Act came into force. In August, 1955 the husband filed a petition in the court of a Munsif for judicial separation under s 10 of the Act on the ground of the wife's desertion. An *ex parte* decree was passed against the wife which was later on set aside. The wife also raised an objection that the Munsif had no jurisdiction to grant the decree. That objection was accepted and the plaint was returned for being presented to the proper court. In 1959 the husband divorced Countess Rita. The trial court delivered its judgment in July, 1964 allowing the husband's petition for judicial separation and granting a decree for that relief. The matter was taken in appeal to the first appellate court which affirmed the decision of the trial court. A second appeal was filed to the High Court by the wife which was heard by a learned single Judge but he referred the same to a Division Bench. The Division Bench dismissed the appeal but directed the husband to pay Rs 150 per month to the wife by way of maintenance.

The concurrent findings of the trial court and the first appellate court which were not questioned before the High Court were these—

- (1) During her stay at Sarela (husband's home) the wife was provided with decent accommodation, wholesome food and all such amenities which were available at Sarela.

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(2) It was wrong that she was given inhuman treatment at Sarela during her stay there and that she had developed heart trouble as a result of it as alleged by the wife.

(3) The wife had left Sarela for her parental home (Alirajpur) with the intention of permanently giving up her marital relation with the husband and not to return to Sarela or to her husband.

(4) The wife left her matrimonial home without any reasonable cause and without the consent of the husband and with the intention of bringing cohabitation to an end.

(5) The marriage of the husband with Countess Rita did not have any such impact on the mind of the wife that it caused her to continue to live apart and to continue the desertion.

Under s 10(1)(a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on 17th May, 1955. The petition for judicial separation was filed on 8th August, 1955 under the Act which came into force on 18th May, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the

petition In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn, p 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse, namely, the factum, i.e. physical separation and the *animus deserendi* i.e. the intention to bring cohabitation permanently to an end The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary women would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been The doctrine of "constructive desertion" is discussed at p 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him

In *Lachman Utamchand Kirpalani v Meena alias Mota* (1) this Court had occasion to consider the true

(1) (1964) 4 S.C.R. 381.

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meaning and ambit of s. 10(1)(a) of the Act read with the Explanation. Reference was made in the majority judgment to the earlier decision in *Bipin Chander Jai Singhbhai Shah v Prabhawati* (1) in which all the English decisions as also the statement contained in authoritative text books were considered. After referring to the two essential conditions, namely, the factum of physical separation and the *animus deserendi* which meant the intention to bring the cohabitation permanently to an end as also the two elements so far as the deserted spouse was concerned i.e. (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention aforesaid, it was observed while examining how desertion might come to an end

“In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regards to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reasons of the conduct of the deserted spouse.”

Now the sole question in the present case is whether during the statutory period of two years in terms of s. 10(1)(a) the husband had, by word or conduct, provid-



ed a just cause to his wife to desist from making any attempt at reconciliation or resuming cohabitation. Ordinarily the fact that he had married Countess Rita on 17th May, 1955 would have furnished a just cause to the wife to desist from making any attempt at reconciliation or resuming cohabitation but this is subject to a very important condition, namely, that the second marriage should have had such an impact on the mind of the wife so as to cause her to continue to live apart and continue the desertion. If the conduct of the husband has had no such effect on her mind it cannot be said that the desertion on her part terminated by reason of the conduct of the husband. The finding of the courts including the High Court is that the marriage of the husband with Countess Rita did not have any such impact on the mind of the wife as is contemplated by law. This finding together with the other findings would conclude the matter because it is quite clear that within the meaning of the Explanation to s 10(1)(a) the desertion by the wife had been proved without reasonable cause and without the consent or against the wish of the husband.

Although it is not necessary to go into the facts but we may recapitulate what has been proved, established or admitted. It was the wife who left her husband's home in 1947 and thereafter consistently refused to return to the husband notwithstanding the fact that she had been treated properly when she lived with him. The husband had been making persistent efforts to persuade the wife to return. After the husband joined the Foreign Service in August, 1948 he was sent for training abroad to Cambridge where he remained till 1949. It is in evidence that while at Cambridge he wrote to his wife asking her to join him in England. In September, 1951 he was posted as Second Secretary to the

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Indian Embassy at the Hague in Holland. Even then the husband made efforts to persuade her to return to him. The husband sent a letter to the wife in October, 1953 saying that the existing state of affairs could not continue indefinitely and that she should resume cohabitation. She was asked to disclose the reasons for her persistent refusal to come and live with the husband. The wife sent a reply on 17th April, 1954 through an advocate. Amongst other things she wrote that despite everything she wished him happiness. She expressed a desire for her *Stridhan* including her household effects, jewellery and presents of the value of Rs 90,000 which had been left at Sarela to be returned to her and for arrangement to be made for her separate maintenance and residence. The High Court has pointed out that although by that time the wife was aware of the friendship between her husband and Countess Rita she never referred to that fact in her reply as a factor which would stand in her way to return to him. We have no doubt, therefore, that the High Court came to the correct conclusion that the subsequent marriage of the husband with Countess Rita in 1955 had no impact on the wife and she had left originally with the object of bringing cohabitation to an end and the desertion on her part continued throughout without any reasonable cause. As a matter of fact during the pendency of the petition for grant of certificate to appeal to this Court filed by the wife an effort was made by the husband, who had divorced Countess Rita by that time, to receive the wife back provided she was willing to live with him. Her counsel informed the Court that she was not agreeable to living with him as his wife.

Before the High Court reliance was placed on certain decisions of the Andhra Pradesh High Court in support of the contention that owing to the provisions

contained in the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 as well as the Hindu Adoption and Maintenance Act, 1956 desertion could not be described as one without reasonable cause if the husband had married again since that marriage afforded justifiable cause to the wife to live apart from the husband

In *Sirigiri Pulliah v Sirigiri Rushingamma* (1) it was held that the effect of the two aforesaid Acts was that a wife was entitled to claim separate maintenance and residence from her husband if he should marry again. If the wife could claim maintenance on the ground that the husband had remarried it could not be said that she had deserted her husband without reasonable cause within the meaning of s. 10(1)(a) of the Act. In that case a petition had been filed for judicial separation under s. 10(1)(a) of the Act. The husband had taken a second wife and she was entitled to live separately and claim maintenance. The husband, therefore, could not claim judicial separation on the ground of desertion. The husband had taken second wife several years before starting proceedings under the Act and some times after the wife had obtained a decree for maintenance. The High Court was of the view that the second marriage of the husband was a good ground for the first wife to live separately and that was a justifiable reasons for doing so. There would thus be no scope for the argument that desertion was without reasonable cause within the meaning of s. 10(1)(a) of the Act. The Madras High Court, however, in *A Annamalai Mudaliar v Perumayee Ammal* (2), expressed the opinion that the right to live separately from the husband given to the wife under s. 18(2)(d) of the Hindu Adoptions and Maintenance Act, 1956 could not be the same as a right

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(1) AIR 1961 1 P 32

(2) AIR 1965 Mad 184

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of judicial separation under s 10(2) of the Act. The true principle behind s 18(2) was that it should be open to the wife to claim to live separately from her husband in case he had got another wife living when the wife did not want to seek divorce or judicial separation. In the judgment under appeal it has been pointed out that desertion within the meaning of s 10(1)(a) of the Act read with the Explanation does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without *animus deserendi* there can be no desertion within the meaning of s 10(1)(a). The consideration that in case the husband remarries, the wife is entitled to separate residence and maintenance under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 or any other enactment could not be utilised as a reason for coming to the conclusion that the fact of the re-marriage of the husband must necessarily afford a reasonable cause for desertion.

In our judgment the view of the Allahabad High Court in the present case must be upheld. The preamble of the Act describes it as one to amend and codify the law relating to marriage among Hindus. It is well known that when a particular branch of law is codified it is intended and the object essentially is that on any matter specifically dealt with by that law it should be sought for in the codified enactment alone when any question arises relating to that matter. Ordinarily when it has been expressly stated that an enactment is meant for codifying the law the court is not at liberty to look to any other law. The Act not only amends but also codified the law of marriage and it has made fundamental and material changes in the prior law. S 4 of the Act gives overriding effect to its provisions.

Therefore unless in any other enactment there is a provision which abrogates any provision of the Act or repeals it expressly or by necessary implication the provisions of the Act alone will be applicable to matters dealt with or covered by the same. Ss 9 and 10 of the Act provide for restitution of conjugal rights and judicial separation. S 10 deals with judicial separation and once a decree for judicial separation has been granted a decree for dissolution of marriage can be passed under s 13(1-A) provided there has been no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of the decree for judicial separation. It may be mentioned that s. 13 gives several grounds for dissolution of marriage by a decree of divorce and one of the grounds is the one contained in sub-s (1-A) of that section. The Hindu Adoptions and Maintenance Act, 1956, hereinafter called the 'Maintenance Act' also amended and codified the law relating to adoptions and maintenance among Hindus. S 18(2) provides, *inter alia*, that the Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her or if he has any other wife living. Indeed the last cl (g) of s 18(2) is very general i.e., if there is any other cause justifying her living separately. S 10 of the Act and s 18 of the Maintenance Act are quite distinct and one cannot be said to control the other. The former provision deals with the matrimonial offences by either spouse which would justify the grant of a decree for judicial separation. S 18 provides for grant of maintenance to wife alone. Sub-s. (1) says that a Hindu wife shall be entitled to be maintained by her husband during her lifetime. Sub-s (2) gives her a right to live

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separately from her husband without forfeiting her claim to maintenance provided any of the conditions mentioned in cl (a) to (g) exist or are specified. The essential ingredient of desertion, *animus deserendi* i.e., intention on the part of the deserting spouse to remain separated permanently or to bring cohabitation to an end for ever need not exist in case of a wife who has been given the right to live separately in certain circumstances without forfeiting her claim to maintenance. The Act and the Maintenance Act provide different remedies to a wife whose husband has been guilty of desertion. Under the Act she can sue for judicial separation if the conditions laid down in s 10(1)(a) of the Act read with the Explanation are satisfied. She can without resorting to that remedy choose to live separately from her husband who would be bound to maintain her if it is proved that he has been guilty of desertion and the other conditions laid down in s 18(2)(a) are satisfied. It is significant that under s 13(2) of the Act a wife may present a petition for dissolution of marriage by a decree of divorce on the ground that the husband had married again before the commencement of the Act or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner. But this can be done only if the marriage with the petitioner was also solemnized before the commencement of the Act. For instance in the present case the wife could have asked for dissolution of her marriage under the aforesaid provisions because the marriage of the husband with Countess Rita was performed before the Act came into force. If she, however, did not choose to resort to that remedy she could decide to live separately under s 18(2)(d) of the Maintenance Act. This shows the sharp contrast in the provisions of the two enactments. When the wife chooses to live separately

under s 18(2)(d) in the circumstances mentioned before she would be entitled to maintenance from the husband. He could not compel her to return to him so long as his marriage with the other wife is not dissolved but if that marriage is dissolved the husband can call upon the wife to return to him and if she does not return it is very doubtful if she can still claim maintenance from him under s 18 of the Maintenance Act. However, this is a matter on which we need express no final opinion. All that we are concerned with, in the present case, is whether the provisions of s 18(2) of the Maintenance Act can affect the matters provided for by s 10 of the Act. It is quite obvious that s 18 of the Maintenance Act does not amend or abrogate the provisions of s 10 of the Act which alone must be looked at for the purpose of disposing of the appeal before us. We have no hesitation, therefore, in upholding the view of the High Court with the result that the appeal fails and it is dismissed. The parties are left to bear their own costs in this Court.

*Appeal dismissed*

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## SUPREME COURT

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### APPELLATE CIVIL

*Before Mr Justice I N Ray and Mr Justice M H Beg*  
 GANGA DEVI AND OTHERS, FIC APPELLANTS,

*v*

STATE OF U P RESPONDENTS

**U. P. Zamindari Abolition and Land Reforms Act, 1950, s 39(1)(c)—Gross assets of a Mahal—Determination—"Sayari"—**  
 S 3(26)

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The Sayari income during ten agricultural years immediately preceding the date of vesting should be taken into consideration in determining the gross assets under s 39 of the Act.

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The income derived by the landlord from persons who have been given licences to cut and remove Poola grass from forest would be Savai

—, 1950, s 39(1)(e)—*Computation of average annual income from forest*

The two clauses in s 39(1)(e) are independent methods of finding out the average annual income from forest. The Compensation Officer cannot adopt either of the two clauses. He has to refer to both the clauses. The Compensation Officer is to compute the average income by taking recourse to both the methods. The second clause which speaks of appraisalment of the annual yield will be done *inter alia* by taking into consideration the number and age of trees, the area of cultivation and produce.

Civil Appeals nos 41 to 46 of 1967 from the judgment and order dated the 1st September, 1965 of the Allahabad High Court in F A nos 513 of 1955 etc

M C Chagla (S R. Agarwala, A T M Sampath and E G Agarwala, with him), for the Appellants.

L M Singhu (O P Rana, with him), for the Respondents

RAY, J —These six appeals are by certificate from the judgment dated 1st September, 1965 of the High Court at Allahabad. Lala Triloki Nath and Lala Digambar Prasad filed four appeals and the State two in the High Court against the order dated 6th September, 1955 of the Compensation Officer. During the pendency of the appeals the Lalas died and the appellants were brought on record. The High Court allowed the appeals filed by the State and allowed in part the appeals filed by the appellants. The appellants have come up by certificate in these six appeals.

Each of the Lalas held equal one half share in each of the forests in the villages of Chhariba and Prithipur in Dehra Dun District. By a notification dated 1st July, 1952 under the U P Zamindari Abolition and Land Reforms Act, 1950 (hereinafter called the Act) the entire forest vested in the State of Uttar Pradesh,



On 2nd May, 1953 the Lalas received the Draft Compensation Assessment Rolls under s. 46(1)(b) of the Act which showed annual compensation to be paid to the Lalas as nil

The Lalas thereafter on 20th May, 1953 filed their objections against the draft compensation roll and claimed compensation under the provisions of the Act

With regard to village Chharba the Lalas claimed that it was a valuable sal forest comprising 225 acres. The Lalas assessed the worth of the forest at Rs.3,40,000. They claimed that Sayar income during the 10 agricultural years immediately preceding the date of vesting should be computed separately and added to the gross income from the forests. They further claimed that income by selling Poola grass was to be within Sayar income. The next head of claim was that they did not have accounts of the income of the forest for the previous 20 years but they were able to produce accounts for four years from 1944 up to 1947 and the share of each of the Lalas on the basis of the income derived for the said four years came to Rs 1,274-12-0 and on the basis of the appraisement of the annual yield on the date of vesting it came to Rs.5,457. On this basis each of the Lalas claimed Rs 46,740 as compensation in respect of village Chharba.

With regard to the Prithipur forest the Lalas claimed that they had worked the forest during the year 1945 to 1952 and that the average annual income of each of their share from the Prithipur forest on the basis of 20 agricultural years immediately preceding the date of vesting came to Rs 5,106. The Lalas stated that on the basis of appraisement of the annual yield on the date of vesting of the forest Prithipur the share of each came to Rs 7,955. On this basis each of the Lalas claimed a

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sum of Rs.1,01,114 and odd as compensation for the forest Prithipuri

The Compensation Officer decided that the income from the Poola grass was not Sayar income but forest income and disallowed income from Poola grass in entirety. The Compensation Officer however allowed some Sayar income in each forest and decided that the average annual income of the forest under s 39(1)(e) of the Act should be calculated on the basis of the period of 25 years immediately preceding the date of vesting and not 20 years as the Lalas had claimed. With regard to the forest in village Chharba the Compensation Officer arrived at the figure of Rs 55,292 consisting of Rs 4,300 as Sayar income and Rs 50,992 as the forest income for computation of average annual income on the basis of the period of 25 years and thus arrived at the average annual income of Rs 2,211-8-0 under s 39(1)(e)(i) of the Act, with regard to the computation of average annual income on the appraisalment of the annual yield of the forest on the date of vesting as contemplated in s 39(1)(e)(ii) of the Act the Compensation Officer held that the representative area was not specified by the Lalas with enumeration or location and the enumeration figures of the Lalas were based on estimated and presumed calculations.

The Lalas appraised Rs 11,000 as the annual yield on the date of vesting. The Compensation Officer found that the forest had been felled about 6 to 8 years before vesting and the age of the crop for that reason could not be more than 8 years for coppice. The Compensation Officer thus appraised Rs 800 as the annual yield and determined Rs 2,211-8-0 and Rs 800 aggregating Rs 3,011-8-0 as the average annual income to be added to the gross assets for assessment of compensation.

With regard to the forest in village Prithipur the Lalas claimed Rs 5,106 as the annual income for a period of 20 agricultural years immediately preceding the date of vesting and appraised the annual yield on the date of vesting at Rs 7,955. The Lalas claimed one-tenth of the Sayar income for 10 agricultural years at Rs 2,007-8. The Compensation Officer disallowed income from Poola grass but allowed Sayar income of Rs.23,550 and added the same to the forest income of Rs.1,13,914 aggregating Rs 1,37,464 on the basis of a period of 25 years and thus arrived at the average annual income of the forest under s 39(1)(e) of the Act at Rs 5,496-8-0. The Compensation Officer appraised the annual yield at Rs 1,650 and thus arrived at the total sum of Rs 7,146-8-0 to be added as gross assets of forest income.

In the High Court the State contended that the Compensation Officer was in error in adding the annual income on the basis of a period of 25 years and the appraisement of the annual yield in order to arrive at the average annual income under s. 39(1)(e) of the Act. The contentions of the Lalas in the High Court were these. First, the income from Poola grass was Sayar income and should have been allowed and added separately to the average annual income. With regard to Prithipur forest it was said that the Compensation Officer wrongly rejected the Sayar income for the Fasli years 1352 and 1353 amounting to Rs 4,600 and Rs 4,500 respectively. Secondly, the average annual income from forest should have been determined on the basis of income for a period of 20 and not 25 years. Thirdly, the Compensation Officer was in error in not accepting the whole income of the Prithipur forest for the Fasli years 1352, 1356, 1357 and 1358 by holding that the income during those four years had been derived by processing wood and therefore the income was made

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by activities in the nature of trade and was not forest income. Fourthly, the Compensation Officer should have accepted the appraisal of the annual yield of the forest on the date of vesting as claimed by the Lalas.

The High Court came to the conclusion that the Lalas were entitled to income from Poola grass as Sayar income and thus allowed the appeals of the Lalas in part. The Sayar income is not to be clubbed with the average annual income but is to be dealt with separately.

Sayar income is dealt with in s 39(1)(c) of the Act. Sayar is not defined in the Act but in s 3(26) of the Act the word 'Sayar' is to have the meaning assigned to it in the United Provinces Tenancy Act, 1939. In the 1939 Tenancy Act Sayar includes whatever is to be paid or delivered by a lessee or licensee on account of right of gathering produce, forest rights, fisheries and the use of water for irrigation from artificial sources. Therefore the income derived by the landlord from persons who have been given licences to cut and remove Poola grass from forest has been held by the High Court to be Sayar. We agree with the reasoning of the High Court. The High Court was correct in holding that the Sayar income during 10 agricultural years immediately preceding the date of vesting should be taken into consideration in determining the gross assets under s 39 of the Act.

Counsel for the appellants submitted that the High Court did not deal with the finding of the Compensation Officer with regard to income from Poola grass for the Fasli years 1352 and 1353 in respect of Prithipur forest. The Lalas claimed for the Fasli year 1352 a sum of Rs 4,600 and for the Fasli year 1353 sum of Rs 4,500 as income from Poola grass. The Compensation Officer gave the additional reason for rejecting the income from Poola grass for these two years that in the extract of *khatauni* it was not mentioned as to what

the source of income was. Exhibit P-3 being the extract from *khatauni* for the Fasli year 1352 would show that Rs 4,600 was the rent for cl 13 *sawai* items. Again, Ex P-10 for the Fasli year 1353 in respect of Prithipur forest would show the sum of Rs 4,500 on account of rent for Sayar. Therefore when the Compensation Officer will deal with Sayar income he will take into consideration Exs P-3 and P-10 for the Fasli years 1352 and 1353.

In the High Court it was contended that the Compensation Officer was wrong in taking 25 years to be the period on the basis of which annual average income of the forest was to be computed under s 39(1)(e) of the Act. The High Court did not accept that contention. This contention was not repeated in this Court.

The High Court held that the Compensation Officer was wrong in arriving at the average annual income by adding the annual income on the basis of a period of 25 years and the apraisement of the annual yield on the date of vesting. The High Court said that the two clauses in s 39(1)(e) of the Act were independent methods of finding out the average annual income from forest and it was not intended that the average annual income should be arrived at by adding the two methods. S 39(1)(e) of the Act speaks of computation of average annual income from forest (i) on the basis of income for a period of 20 to 40 agricultural years immediately preceding the date of vesting as the Compensation Officer may consider reasonable, and (ii) on the apraisement of the annual yield of the forest on the date of vesting. The two are separate matters. It cannot be said that the Compensation Officer will adopt either of the clauses. The Compensation Officer has to refer to both the clauses in order to compute the average annual income from forest. The High Court is correct in holding that the average annual income from forest

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under s. 39(1)(e) of the Act cannot be computed by arithmetical addition of the figures arrived at on the basis of cl (i) and on the basis of cl. (ii) It is the average annual income from forest which is to be computed The words of importance are 'average annual income' Under the first clause the actual income derived from the forest for a number of years before the date of vesting as the Compensation Officer may consider reasonable is to be taken and the average calculated Under the second clause the annual yield as on the date of vesting is to be appraised The Compensation Officer is to compute the average income by taking recourse to both the methods The second clause which speaks of appraisement of the annual yield will be done *inter alia* by taking into consideration the number and age of trees, the area of cultivation and the produce

In the present appeals the High Court found on the materials that the forest had been felled almost completely during the last 9 or 10 years preceding the date of vesting. The evidence further established that there were no mature trees for felling and that the bulk of the crop that had existed had grown within a period of 8 years It was therefore clear that the whole of the forest's income derived during those 9 or 10 years for which accounts of the Lalas were available represented the whole growth of the forest during the last 40 years, and even if the forest had been gradually cut during the last 40 years the income derived would not have been substantially more than what have been derived during the last 9 or 10 years preceding the date of vesting

The High Court assessed the evidence We do not find that there is any error in regard to the appreciation or assessment of evidence by the High Court and

the conclusion that under s 39(1)(e) of the Act the annual average income of Prithipur forest came to Rs 4,396 56 and of village Chharba at Rs 2,039 68

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Counsel for the appellants contended that the Compensation Officer did not consider the entire forest income for the Fashl years 1352, 1356, 1357 and 1358 for the Prithipur forest on the ground that the entire income was not the sale price of forest but that the Lalas worked the forest and a portion of the income was from the sale of the timber of that forest. The High Court rightly held that the forest income was referable to the price of the standing timber and income which the Lalas derived by processing wood would not be within forest income.

For these reasons we uphold the judgment and order of the High Court with this modification that when the Compensation Officer will deal with the income from Poola grass as Sayar income as directed by High Court the Compensation Officer will also take consideration the income from Poola grass for the Prithipur forest for the years 1352 and 1353 Fashl.

In the facts and circumstances of the case the appeals are dismissed. The parties will pay and bear their own costs.

*Appeals dismissed.*

## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr. Justice  
P. N. Bakshi*

SRIMATI MUNIA

APPELLANT,

v

BOARD OF REVENUE, U P AND OTHERS

... RESPONDENTS.

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**U. P. Zamindari Abolition and Land Reforms Act, 1950, s 20—Introduction of—Amendment, of s 209 in 1962—Not retrospective—Suit instituted before the amendment—State Government not a necessary party**

The amending Act no 21 of 1962 does not make the amendment retrospective either expressly or by necessary intendment. The State Government is not a necessary party to the suits under s 209 of the Act instituted prior to the date on which the amendments came into force and which were pending and such a suit could not be dismissed for non-impleadment of the State Government.

Special Appeal no 1055 of 1968 against the judgment and decree of G. C MATHUR, J. in Civil Miscellaneous Writ no 2210 of 1967 decided on 11th October, 1968.

G N. Verma, for the Appellant

G P. Bhargava, A N Bhargava, R O Misra, H P Dubey and S. C., for the Respondents

S CHANDRA, J —This is a plaintiff's special appeal. It arises out of a suit for ejectment under s 209, U. P. Zamindari Abolition Act

The plaintiff's case is that her husband was suffering from cancer. She invited her relations Matho and Sukhdeo, respondents, to come and help her in cultivation of her land. After the plaintiff's husband died, these respondents continued to cultivate and manage the land on behalf of the plaintiff. Later, they turned dishonest and with a view to deprive the plaintiff of her



property, they instituted a suit (no 71 of 1956) for an injunction against the plaintiff, in the civil court. The suit was carried to the High Court in appeal. The High Court on 1st August, 1961 dismissed the suit, on the finding that the respondents were merely managers and were in possession as licensees on behalf of the plaintiff. They had no right or title to the land in dispute.

During the pendency of this suit, the plaintiff instituted the present suit on 10th October, 1957, for the ejectment of the respondents under s 209 of the Zamindari Abolition Act. The respondents contested the suit. In view of the pleadings of the parties, the trial court framed issues on 30th November, 1957. One of the issues was whether the suit was liable to be stayed under s 10, C P C. The trial court decided this issue in favour of the defendants and stayed the hearing of the suit till the disposal of the earlier suit for an injunction.

After the dismissal of the suit for injunction on 1st August, 1961, the hearing of the present suit commenced. While the suit was pending in the trial court, the U P Land Laws (Amendment) Act, No 21 of 1962 came into force on 13th December, 1962. S 9 of this amending Act introduced the following sub-s (2) to S. 209

“(2) To every suit relating to a land referred to in cl (a) of sub-s (1) the State Government shall be impleaded as necessary party.”

In view of this provision, the defendants on 31d April, 1963, with the leave of the court, amended their written statement. They pleaded that the suit was bad for failure to implead the State of U P and Gaon Sabha as parties. On the basis of this plea, the trial court framed an additional issue no, 7:

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"Whether the suit was defective on account of non-joinder of the U P State and Gaon Samaj as parties."

The plaintiff, however, did not apply for impleading the State of U P or the Gaon Sabha as parties

The trial court held that the defendants' plea on the merits of the case was barred by *res judicata*. In view of the decision in the previous injunction suit, the defendants had no case on the merits. On issue no 7, it was held that the amendment requiring that the State Government shall be impleaded as a party to such a suit was mandatory and retrospective. It applied to pending suits. The plaintiff did not implead the State Government in spite of a specific plea and issue on the point. The suit was hence not maintainable and was dismissed. This view was upheld in appeal as well as in second appeal by the Board of Revenue. Aggrieved, the plaintiff instituted a writ petition in this Court. A learned single Judge held that the amendment related to procedure. It was retrospective and applied to pending suits. The plaintiff not having impleaded the State Government, the suit was liable to be dismissed for failure to implead a necessary party. On this view, the writ petition was dismissed. Aggrieved, the plaintiff has come up in appeal.

The question that requires consideration relates to the nature and right of a person to sue and the impact upon such right of the amendment made to s 209 by requiring that the State Government is a necessary party to such a suit. In *Ganikapati Veeraya v S Chaudhry* (1), the Supreme Court laid down the following principles:

(1) A.I.R. 1967 S.C. 640.

(1) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding

(2) The right of appeal is not a mere matter of procedure but is a substantive right

(3) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit

(4) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of the appeal

(5) This vested right of appeal can be taken away by a subsequent enactment, if it is so provides expressly or by necessary intendment and not otherwise.

In that case, on the date of the institution of the suit, the law provided a right of appeal to the Federal Court if the valuation of the suit was above Rs 10,000. By the time an appeal came to be filed in the Supreme Court (which had by then replaced the Federal Court), the valuation for purposes of appeal was raised to Rs 20,000. There was nothing in the law making this change in valuation either expressly or by necessary intendment, retrospective. The Supreme Court held that the raising of the valuation impaired the right of appeal or placed a

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more stringent condition upon it. The true principle is: where a right of appeal is impaired or imperilled or more onerous or stringent condition is put upon the right of appeal, the impairment, peril, or the imposition of stringent condition is not retrospective unless the Legislature says so expressly or by necessary intendment

The Supreme Court decision in *Hoosain Kasam Dada Ltd v State of Madhya Pradesh* (1) is material. In that case, assessment proceedings commenced in 1947. At that time, s 22(1) of the Central Provinces and Berar Sales Tax Tct, 1947, provided that no appeal against the order of assessment should be entertained unless it was shown that such amount of tax as the appellant might admit to be due from him had been paid. The Act was amended on 25th November, 1949, and s 22(1), as amended, provided that no appeal should be admitted unless such appeal was accompanied by satisfactory proof of payment of tax in respect of which the appeal had been preferred. In that case, the appeal was filed after the amendment. The Supreme Court held that the appellant had a vested right of appeal when the proceedings were initiated and his right was governed by the law as it stood then. It was further held that the amendment of 1950 could not be as a mere alteration in procedure or an alteration regulating the exercise of the right of appeal, it whittled down the right itself and that it had no retrospective effect, as the amended Act of 1950 did not expressly or by necessary intendment give it retrospective effect.

This decision was re-affirmed by the Supreme Court in *State of Bombay v Messrs General Films Exchange Ltd* (2). It was observed that this decision proceeded on the principle that impairment of the right of appeal by imposition of an onerous

(1) AIR 1958 SC 221

(2) AIR 1960 SC 980

condition is not a matter of procedure In this case, the Supreme Court approved the Privy Council decision in *Delhi Cloth and General Mills Co Ltd v Income-tax Commissioner* (1) In that case, the judgment-debtor made an application under O. 21, r 90 of the Code of Civil Procedure, for the setting aside of the sale On its dismissal, he appealed Before the institution of the appeal, s 174(c), Bengal Tenancy Act was amended It required deposit of a specific amount as a condition for the entertainment of the appeal The privy council held that by requiring such deposit as a condition precedent to the admission of the appeal, a new restriction had been put on the right of appeal, the admission of which is now hedged in with a condition There could be no doubt that the right of appeal had been affected by the new provision and in the absence of an express enactment this amendment cannot apply to proceedings pending at the date when the new amendment came into force.

In the aforesaid Supreme Court decision, the question was whether an amendment of the Court Fees Act enhancing the court-fee payable on a memorandum of appeal would apply to an appeal filed against a decision of a suit which was instituted prior to the coming into force of the amendment The Supreme Court held that the court-fee was payable according to the provision in force at the time when the suit was filed It was held

"It is thus clear that in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it

(1) AIR 1927 PC 242.

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impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment."

These decisions lay down that a right of appeal is substantive. Any law which impairs or imperils this right or puts more onerous and stringent conditions is not referable to a matter of procedure and is not retrospective unless the Legislature says so either expressly or by necessary intendment. The raising of the valuation for an appeal or imposition of a condition that an appeal shall not be entertained unless the impugned amount of tax was paid or laying down of a rule that an appeal will not be entertainable unless a specific amount was deposited were all laws which made onerous or stringent conditions upon the right of appeal. Since their effect was to impair and imperil a right of appeal they did not relate to procedure for regulating the exercise of the right of appeal; they whittled down the right of appeal and could not be presumed to be retrospective.

In *Garikapati's* case (1) mentioned above it was held that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The right of appeal was a substantive right and was not a mere matter of procedure. If suit, appeal and second appeal are steps of one legal proceeding then the right to each of them will be the same in nature and character. The right of appeal was held to be a substantive, ex-hypothesi, the right to sue would equally be a substantive right and not a matter of procedure.

(1) A I.R., 1987 S.C., 540.

This view is supported by the Full Bench decision in *Ram Baksh v The Board of Revenue* (1) In that case it was held that the amendment of s 209 did not affect pending appeals BISHAMBHAR DAYAL, J. observed that "it has been contended that this is merely a procedural amendment and therefore must be applied retrospectively and the suit, still not having been finally decided, the amendment has to be applied to the case" Repelling this submission his Lordship observed

"In the first place, I am not satisfied that this is merely a procedural amendment A right to litigate the matter in a court of law is a vested right [*G C Ghosh v Abdul Majid* (2)] The matter of procedure only regulates the exercise of that right Making another person a party to the suit is forcing that party to become a litigant and forcing the plaintiff to fight against that party Such an amendment, to my mind, is not merely a procedural amendment"

In the same case BEG, J while agreeing with the opinion of BISHAMBHAR DAYAL, J observed.

"The amendment does not, in my opinion, constitute a declaration of the pre-existing position under the law, making the State Government a necessary party in all suits for ejectment of persons occupying land contrary to law The amendment was not designed to protect the rights of the plaintiffs or the defendants who may be necessary parties to suits under s 209 of the Act according to basic principles of the law of pleadings Their rights and interests were already well protected under the law as it stood before the amendment. The amendment does not also amplify powers of the

(1) 1967 R.D. 418.

(2) A.I.R. 1944 Cal. 163 at 177.

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court to do justice between the contending parties by adding to the armoury of reliefs obtainable under law The result of the amendment is that what was a properly instituted suit would become defective unless the State Government is impleaded "

His Lordship went on to hold

"The amendment only adds a condition or fetter upon the rights of the plaintiff to obtain decrees We are entitled, I think, in the light of the observations already made above, to interpret such a fetter strictly and restrictively . . ."

In this case it was held that the right to sue is a vested right and that requiring the impleadment of the State Government was placing a fetter upon that right The amendment clearly impairs the right to sue. In the present case, the plaintiff had claimed a right to partition without adjudication of his title on the ground that the title had already been finally decided in a previous suit and that the defence was barred by *res judicata* With the introduction of the State Government as a necessary party the plaintiff's right to relief without fresh adjudication of the title on the merits was likely to be defeated Further, the impleadment of the State Government as a party would mean that the plaintiff will have to incur additional cost of a full-fledged trial on the merits of the suit These are clearly placing more onerous conditions upon the plaintiff's right to sue as it existed when the present suit was instituted on 10th October, 1957 In this view, under the law laid down by the Supreme Court in the cases referred to earlier, the placing of such a fetter upon the right to sue would not be a matter of procedure Such a



fetter or an onerous condition can operate retrospectively only if the enactment says expressly or by necessary intendment. The amending Act introducing sub-s (2) to s 209 is ominously silent upon this point. It does not make the amendment retrospective either expressly or by necessary intendment.

There is no denying that the defence was barred by the rule of *res judicata* because the title between the parties had already been finally decided in the previous suit for an injunction. The suit for possession was liable to be decreed.

The plaintiff had also claimed a relief for damages. The trial court refused it on the ground that the claim was not established. The plea does not appear to have been pressed in the appellate courts.

In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside. The decree is set aside. The suit is decreed for ejectment of the defendants and for possession. The suit in so far as it claimed damages is dismissed. The plaintiff-appellant would be entitled to half her costs in all the courts.

*Ordered accordingly*

### CIVIL REVISION (F. B.)

*Before Mr Justice Om Prakash Trivedi, Mr Justice K B Srivastava and Mr Justice Jagmohan Lal\**

DISTRICT CO-OPERATIVE DEVELOPMENT FEDERATION  
LIMITED, PRATAPGARH

APPLICANT,

*v*

RAM SAMUJH TEWARI

OPPOSITE-PARTY

Indian Arbitration Act, 1940, s 14(2)—Application under—  
No prayer for summoning the award or for direction to

\*while sitting at Lucknow

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*arbitrator to file the award—Maintainability of—Bringing the award on record—Methods for*

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The award can be summoned by the Court from the arbitrator *suo motu* under s 14(2) if by any means the fact of making of an award comes to the Court's notice and the making of an application under s 14(2) containing a prayer for summoning the award is not a condition precedent or necessary to the exercise of such a power by the Court. The award may be produced before the Court by the arbitrator also *suo motu* without either any party to the agreement making a request or without the award being summoned by the Court. In either case, whether the award is filed before the Court on being summoned on an application by a party under s 14(2) or on the award being filed by the arbitrator *suo motu* or on the award being summoned by the Court *suo motu*, the Court must proceed to give notice of filing of the award to the parties and act under s 17. The Court must pass a decree in terms of the award when it sees no cause to remit or set aside the award.

*Hazi Rahmatullah v Ch Vidya Bhusan* (1), and *R L Sondhi v A G Punjab* (2) relied on.

*Amod Kumar Verma v Hari Prasad Burman* (3) explained and distinguished.

—, 1940 ss 14(2), 17 and *Limitation Act*, 1908, Art. 178—*Applicability of—Award filed beyond the statutory period of 90 days—Effect of*

The limitation of 90 days under Art 178 of the Limitation Act, 1908, for filing the award is confined only to those cases in which the award is filed by the arbitrator at the request of a party to the arbitration agreement after the arbitrator or umpire has given notice in writing to the parties of the making and signing of the award. But Art. 178 will not govern an award which is filed by the arbitrator either *suo motu* or on the *suo motu* direction of the Court in the absence of an application under s 14 of the Act.

*Ram Bilas Mahte v. Babu Durga Bijai Prasad Singh* (4), dissented from. *Mohd Yusuf v Mohd Husain* (5), *Nathuram Girwarchand v Baijnath* (6), and *Champalal v Mt. Samrath Raj* (7) relied on.

—, 1940, s 14(1)(2) and *Limitation Act*, 1908, Art 178—*Application for filing of award in Court—Limitation for—Starting point of—Notice under, s 14(1)—Service of—Mode for*

(1) A I R 1966 All 602

(3) A I R 1968 All 720

(5) A I R 1964 Mad 1

(2) A I R 1952 Punjab 350

(4) A I R 1965 Pat 289

(6) A I R 1969 M P 422

(7) A I R 1960 S C 629

An application under the Arbitration Act, 1940, for the filing in the Court of an award has to be made within 90 days "from the date of service of the notice of the making of the award". The signing of the award by the parties and then counsel did not amount to notice both under Art 178 of the Limitation Act, 1908 and also under s 14(1) of the Arbitration Act. Limitation under Art 178 does not start from the date of knowledge but from the date of service of the notice of the making of award. Knowledge will not be the *terminus a quo*. The starting point of limitation will be the date of service of the notice in writing. The notice under s 14(1) is a notice required by the Act to be served by the arbitrators or umpire.

Service must be made primarily in accordance with the mode of service agreed to between the parties in their arbitration agreement and if there be no such provision in the arbitration agreement, then in either of the two manners prescribed by s 42 of the Arbitration Act.

*Gaya Ram v Radha Kishen* (1), *Misra Lal v Bhagwati Pd* (2), *Jagdish v Sunder* (3), relied on.

*Parasramka Commercial Co Ltd v Union of India* (4), referred to.

Civil Revision No 111 of 1962 against the judgment and decree dated 30th July, 1962, passed by R B LAL, Additional Civil Judge, Pratapgarh.

R K Srivastava, for the applicant.

S C Das, Kesri Bn Prasad and H. N. Tilhari, for the opposite-party.

O P TRIVEDI, J. - This revision has been referred for decision to Full Bench by order of Hon'ble the Chief Justice, dated 17th April, 1972 on the ground that there appeared to be a conflict between the two Division Bench decisions of this Court reported in *Shri Ram v Shripal Singh* (5) and *Hazi Rehinatullah v Ch Vidya Bhushan* (6).

The facts leading to this reference, so far as material for our present purposes, are as follows:

There was a written agreement dated 9th February, 1959 between the District Co-operative Development

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(1) AIR 1965 Punjab 115

(2) AIR 1949 Pat 389

(5) AIR 1957 All 106

(3) AIR 1955 All 573

(4) AIR 1970 SC 1664

(6) AIR 1963 All 602

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Federation Ltd. Pratapgarh, petitioner, and Ram Samujh Tewari, opposite-party, by which Ram Samujh Tewari was appointed Thekedar for running a brick kiln. One of the terms of the agreement was that in case of dispute between the parties arising out of the agreement the same would be referred for arbitration by the Deputy Commissioner, Pratapgarh. In accordance with this stipulation an application was moved by the petitioner before the Deputy Commissioner alleging that there was a breach of terms of the agreement by the opposite-party and the Deputy Commissioner was urged to decide the same. On this dispute the Deputy Commissioner gave an award dated 7th March, 1961 awarding a sum of Rs 13,667 29 to the District Co-operative Development Federation against Ram Samujh Tewari. On 5th July, 1961 the petitioner filed an application purporting to be under s 14 of the Indian Arbitration Act (Act X of 1940) before the Civil Judge, Pratapgarh bringing out the fact that in terms of the agreement an award had been made by the Deputy Commissioner on 7th March, 1961 for the aforesaid amount, but the opposite-party had not made any payment in terms of the award. The only prayer contained in the application was that a decree may be made in terms of the award. On 3rd January, 1962 another application was moved on behalf of the District Co-operative Development Federation under O 13, r 1, C P C praying for summoning of the award along with connected papers from the Deputy Commissioner. The same day the Civil Judge ordered summoning of the award which was produced by the arbitrator before him on 7th February, 1962. This award was signed by Sri Manohar Prasad, Vakil for the petitioner Federation and Sri Rajeshwar Parsad Tripathi Vakil for opposite-party Ram Samujh

Tewari on 8th March, 1961. On 7th February, 1962 the Court issued to the parties notice for filing of the award and invited objections within a month. Only the opposite-party filed objections under s 14(3) of the Arbitration Act. The objections were dismissed on merits. The application of the petitioner for making the award rule of the Court was resisted on a number of grounds. One of the grounds was that the application as framed was not maintainable, for although it purported to be one under s 14 of the Arbitration Act it contained no prayer for summoning the award or for a direction to the arbitrator to file the award as required by s. 14(2) of the Arbitration Act (hereinafter called the Act). The Civil Judge took the view that an application under s 14(2) of the Act with a prayer for summoning the award must be made within 90 days of the date of service of notice of making of the award and since no such application was made within 90 days the application dated 5th July, 1961 as framed was not maintainable and refused to pass a decree in terms of the award. The correctness of this view of the learned Civil Judge is challenged in this revision.

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The short point which falls for determination in the present case is whether a decree in terms of the award could not be passed on the basis of the application of 5th July, 1961 under s 11 which was moved for the petitioner before the lower court mainly because it contained no prayer in terms of s. 14(2) of the Act for a direction by the Court for summoning the award from the arbitrator. A decree on the basis of an award can be made only under s 17 of the Act. S 14(1) of the Act provides that when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees

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and charges payable in respect of the arbitration and award

S 14(2) of the Act is in these terms

"The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court and the Court shall thereupon give notice to the parties of the filing of the award"

It was held in the case of *Amod Kumar Varma v Hari Prasad Burman* (1) that the provisions of s 17 can be applied only in a proceeding started with an application under s 14 and in a proceeding started under s 33, when no proceeding started under s 14 is pending, no decree can be passed and the only order that can be passed is one refusing to set aside the award. It was also observed in that case that an application to set aside the award before filing of the award under s 14 is incompetent. A party aggrieved by the award can challenge it only through an application under s 33 and must proceed under s 14. Much stress is laid for the opposite-party by these observations made in the case of *Amod Kumar Varma* (1), but these observations should not be read in isolation or divorced from the context in which they were made and should not be taken to lay down that a decree cannot be passed by the Court under s 17 of the Act under any circumstances when an application for filing of the award was never made

(1) A I R 1958 All 720

under s 14 I am of the view that the exercise of jurisdiction by Court under s 17 for making a decree in terms of an award is not necessarily dependent on the filing of an application by a party to the arbitration agreement under s 14 (2) with a prayer for Court's direction to summon the award. No doubt it is open to any party to the arbitration agreement or any such person claiming under such party to move the Court by an application under s 14(3) to cause the award to be filed and when the award is summoned on such an application and produced in Court, the Court may proceed under sub-s (3) of s 14, ss 15 and 16 and make a decree in terms of the award under s 17. But that is not the only procedure which will lead to the making of an award by the Court under s 17. The Court on its own motion and *suo motu* under s 14(2) direct the arbitrator to file the award if under any circumstances the Court receives information of the making of the award. There is no limitation provided for such *suo motu* summoning of the award by the Court from the arbitrator. It is noteworthy that sub-s (2) of s 14 of the Act does not contain any provision which may imply that the power to summon the award from the arbitrator is to be exercised by the Court on an application with that prayer being made by a party. This is in contrast with sub-s (3) of s 20 of the Act containing such words as "on such application being made, the Court shall direct notice thereof to be given to all parties to the agreement". I am of the opinion, therefore, that the award can be summoned by the Court from the arbitrator *suo motu* under s 14 (2) if by any means the fact of making of an award comes to the Court's notice and the making of an application under s 14(2) containing a prayer for summoning the award is not a condition prece-

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dent or a necessary condition to the exercise of such power by the Court. The award may be produced before the Court by the arbitrator also *suo motu* without either any party to the agreement making a request or without the award being summoned by the Court. In either case, whether the award is filed before the Court on being summoned on an application by a party under s 14 (2) or on the award being filed by the arbitrator *suo motu* or on the award being summoned by the Court *suo motu*, the Court must proceed to give notice of filing of the award to the parties and act under s 17. The Court must pass a decree in terms of the award when it sees no cause to remit or set aside the award. In the case of *Haji Rahmatulla v Chaudhri Vidya Bhusan* (1) (para 5) it was observed

"S 14 of the Arbitration Act provides for the methods by which an award can come on the record of the Court as a preliminary step to giving the Court jurisdiction to make a decree on the basis of that award. The award can, as the provisions of s 14 indicate, come on the record on an application by a party to have the arbitrator file the award along with the necessary enclosures to the award on the direction of the Court. The award can also come to the Court on the arbitrator taking action in respect of the filing of the award *suo motu*."

In the case of *R. L. Sondhi v Accountant General of Punjab* (2) also the Court recognised the possibility of the award being filed before the Court by the arbitrator *suo motu* or upon a direction given by the Court. There is no limitation provided for filing of the award in Court by the arbitrator either *suo motu* or upon direction of the Court. It follows, therefore,

(1) A I R 1968 All 602

(2) A I R 1952 Pun 350.



that once the award has been filed in court the Court acquires jurisdiction to pass a decree in terms of the award under s 17 and it does not matter under what circumstances the award comes before the Court, that is to say, whether the award has been filed by the arbitrator personally or through an authorised agent *suo motu* or upon the Court's direction. In the present case, the Court had received information about making of the award from the petitioner's application of 5th July, 1961 and actually summoned the award from the arbitrator by order dated 3rd January, 1962. In doing so, the Court appears to have treated the original application of 5th July, 1961 as one under s 14, as it expressly purported to be, or as a source of information to the Court of making of the award. In either case it is clear that the Court summoned the award from the arbitrator in exercise of its power under s 14(2) of the Act. Let us at present postpone consideration of the question whether the application of 5th July, 1961 could be treated as one filed under s 14(2) of the Act and whether the application was maintainable in the absence of a prayer for summoning the award and in the absence of the award being before the Court already. The question arises whether the Court could refuse to act under s 17 and pass a decree in terms of the award when the award had been filed before it by the arbitrator in the above circumstances. Apart from every other aspect of the matter it is clear that the award having come before the Court, the parties having been given intimation of its filing, the Court became vested with jurisdiction to proceed to pass a decree in terms of the award under s 17 of the Act and from that aspect of the matter alone it is clear that the Civil Judge was in error in taking the view that a decree in terms of the award could not be passed when an application as re-

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quired by s 14(2) had not been filed in time. The making of an application under s 14(2) for summoning the award is not a condition precedent to the exercise of jurisdiction under s 17 nor is it a fact which confers jurisdiction on Court to act under s 17. No doubt the Court has no occasion to, nor can it possibly exercise jurisdiction under s 17 so long as the award is not filed before it. A party to the arbitration agreement or a person claiming under such party may adopt the process of moving the Court by an application under s 14(2) with a prayer for summoning the award. A motion by such an application is only one of the processes by which the filing of an award can be secured. The alternative processes, as indicated above consist of summoning of the award by the Court *suo motu* or its production by the arbitrators *suo motu*. Therefore, the exercise of power by the Court under s 17 is not dependent on filing of an application under s 14(2) and the Court can exercise power under s 17 and proceed to pass a decree in terms of the award if the award has been produced before it notwithstanding the fact that an application under s 14(2) had never been moved by a party to the arbitration agreement or a person claiming under such party. Of course, if the award has not been produced before the Court and no application has been filed under s 14 praying for summoning of the award the Court cannot exercise power under s 17 and a decree cannot be passed in terms of the award for the simple reason that the Court is not in a position to know in what terms the award has been made. It is in this sense that observations made in the case of *Amol Kumar Verma* (1) to the effect that "the provisions of s 17 can be applied only in a proceeding started on an application under s 14 and where no proceeding started under s 14 is pending,

no decree can be passed and the only order that can be passed is one refusing to set aside the award", should be understood. In that case the award was not filed before the Court by the arbitrator. It was produced in another suit by a commissioner who had been directed to seize it from the arbitrator. In the peculiar circumstances their Lordships held that the award had not been produced and because no application praying for summoning of the award had been moved under s 14(2) they made the above general observations. It is clear that when these observations were made they were not considering the situation where an award may have been filed in Court. The above observations in the case of *Amod Kumar Varma* (1) therefore, do not apply to the present case. On the other hand, it is noteworthy that in the concluding portion of para 7 of the leading judgment of DESAI, J the following observations were made which support the view which I have expressed.

"Once the award has been filed in court the law will take its course and a decree will be passed if the award is found to be in order."

In para 8 of the report again DESAI, J. observed:

"It follows that a decree can be passed under s 17 only in a case starting with the filing of the award or with an application for the filing of the award under s 14"

In the case of *Haji Rahmatulla v. Chaudhari Vidya Bhusan* (2), an award had come before the Court, having been filed by the plaintiff with a prayer that it may be made rule of the Court. The award had neither been filed by the arbitrator nor by one of the parties to the arbitration agreement nor was an application made in accordance with s 14(2) of the Act

(1) AIR 1958 All 720

(2) AIR 1963 All 602

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The question arose whether it was open to the Court before which the award was filed to act on the award under s 17 and pass a decree on its basis where the award had not been filed as a result of proceeding started under s. 14 of the Act. The question was answered in the affirmative holding that the Court could pass a decree in terms of the award under s. 17 when the award had come before it and it was not necessary that the award should have come before it as a result of specific proceedings, as provided by s 14, being taken. The situation in the present case is similar. There is nothing in terms of s 14 of the Act which can preclude the Court from taking into consideration the award for the purpose of exercising jurisdiction conferred on it by s 17. From this point of view the Civil Judge was in error in refusing to exercise jurisdiction under s 17 of the Act. The award having been produced before it and the parties having been given notice he possessed jurisdiction to pass a decree in terms of the award if he saw no cause for setting aside or remittance of the award. The order of the lower court was erroneous also from another angle. This application of 5th July, 1961 was expressly described as one under s. 14 of the Act. The application contained a prayer for passing a decree in terms of the award but no prayer for summoning of the award in accordance with sub-s (2) of s 14, but this was only a formal defect. The application, purported to be and indeed was expressed to be under s 14, should have been treated as such and jurisdiction exercised under s 17. Indeed the lower court appears to have actually treated the application of 5th July, 1961 as one under s 14 when it actually summoned the award by order of 3rd January, 1962. If the lower court was of the view that the application dated 5th July, 1961 was not strictly an application under s 14(2) of the Act in the absence of a prayer for summoning

the award it could have permitted amendment of that application so as to add such a prayer and should have proceeded under s 17 on such amendment. Against such a course the submission of learned counsel for the opposite party was that an amendment, which took away a right vested in his clients by lapse of time, should not be permitted. No doubt, amendment should not be allowed when limitation for making an application under s. 14 has expired as such an amendment may cause manifest prejudice to the other side. But no such consideration could have arisen in the present case for it is not shown that the application of 5th July, 1961 was filed beyond the period of limitation. Such an application, therefore, could be permitted to be amended to remove a formal defect. Similar view was taken in the case of *Shri Ram v Shripat Singh* (1). It is not necessary in the present case, however, to pass an order of remand for necessary amendment of the application under s 14 dated 5th July, 1961 because the award had already been filed before the lower court and for reasons above stated the Court is competent to act under s 17.

(There remains now to say a few words on a submission on behalf of the opposite-party to the effect that the award had been filed by the arbitrator beyond the limitation of 90 days provided under Art 178 of the Indian Limitation Act and the Court could not pass a decree on the basis of such an award under s 17. I find no force in this argument. There is no limitation provided for filing of an award on the *suo motu* order of the Court or for the arbitrator to file the award *suo motu*. Art 178 of the Indian Limitation Act provided the limitation of 90 days for the filing in Court of an award from the date of service of the notice of the making of the award.

(1) AIR 1957 All 105.

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1973 It follows, therefore, from col 3 against Art. 178  
 DISTRICT that the limitation of 90 days for filing the award is  
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 DEVELOPMENT, filed by the arbitrator at the request of a party to the  
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 TEWARI has given notice in writing to the parties of the  
 OM PRAKASH making and signing of the award. But Art 178  
 Trivedi, J will not govern an award which is filed by the arbitra-  
 tor either *suo motu* or on the *suo motu* direction of  
 the Court in the absence of an application under  
 s 14 of the Act. In the present case the award was  
 summoned by the Court on 3rd January, 1962 and  
 was produced on 7th February, 1962. Support is  
 derived by learned counsel for the opposite-party for  
 his argument from a Patna case *Rambilas Mahto*  
*v Babu Durga Bijai Prasad Singh* (1). It was held  
 in that case that "the act of filing the award in  
 Court after the expiry of the period of limitation  
 though ostensibly the act of the arbitrators or the  
 umpire, is in reality the act of one the other or both  
 parties to the arbitration agreement, that is to say,  
 that the award has been filed on behalf of the one or  
 both the parties. Therefore, the award cannot remain  
 effective or binding upon the parties if no steps are  
 taken to file it in Court within the time allowed for  
 the purpose by the law and the rights of the parties  
 cannot be affected by an award which has not been  
 filed by the arbitrators in Court for several years after  
 it has been made and notice has been given by the  
 arbitrators to the parties of making and signing there-  
 of." I am in respectful disagreement with this view  
 if it is intended to be of general application to cover  
 also cases where the award has been filed by the arbit-  
 rator in court *suo motu*, or where it is filed by the  
 arbitrator on being summoned by the Court *suo motu*,  
 without reference to an application under s 14(2).

(1) AIR 1965 Part 239

of the Act. If the arbitrator has given to the parties notice of the making of the award under s 14(1) and is requested by a party to file it in Court the arbitrator must file it in Court within 90 days of the date of notice of the making of the award as prescribed by Art 178 of the Indian Limitation Act. But there may be cases where the arbitrator gives no notice of the making of the award to the parties as required by s 14(1) of the Act, there is no request to the arbitrator by the parties to file the award in Court, and yet the arbitrator may file the award *suo motu* in Court. It is plain that Art. 178 of the Indian Limitation Act would not govern such a case. In fact there is no limitation provided to cover such a case. In the same way Art 178 will not be attracted if the award is summoned by the Court *suo motu* in the absence of an application as required by s 14(2) and the award is filed by the arbitrator on being summoned by the Court under such circumstances. When the award has been filed by the arbitrator *suo motu* or upon the Court's summon in the absence of an application under s 14(2), it would be manifestly unjust and would lead to miscarriage of justice if the Courts were to hold that an award filed by the arbitrator under such circumstances would not be binding or lose its effectiveness. There appears to be no reason in the present case not to take the view that the award was summoned by the Court from the arbitrator in exercise of its *suo motu* powers when the application of 5th July, 1961 did not in terms contain a prayer for summoning the award under s 14(2). In that view of the matter there would be no question of limitation in this view of the matter, which I take, I do not consider it necessary to enter into the question whether the petitioner had in fact received notice of the

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making of the award—a fact which is not free from difficulty

On the foregoing reasons and considerations I hold that the Civil Judge was in error in holding that the application of 5th July, 1961 was not maintainable and that he was incompetent to pass a decree in terms of the award under s 17 of the Act. The learned Civil Judge decided issues 2, 3 and 4 against the opposite-party and dismissed the suit only on the ground that the application of 5th July, 1961 was not maintainable. This was, for reasons already stated, an erroneous view. He was also in error in ignoring the fact that he was competent to exercise power under s 17 in view of the fact that the award had actually been produced before him. In the circumstances the revision is entitled to succeed and should, in my opinion, be allowed.

I would, therefore, allow the revision, set aside the judgment of the lower Court dated 30th July, 1962 and decree the suit for making the award rule of the Court and direct the making of a decree in terms of the award with costs of this Court and lower Court against the defendant-opposite-party.

K. B. SRIVASTAVA, J.:—I have had the advantage of reading the judgments prepared by my brothers O P TRIVEDI and JAGMOHAN LAL. In view, however, of certain observations made by brother JAGMOHAN LAL, I would like to add a few words of my own.

The revision concerns a matter under the Arbitration Act hereinafter referred to as the Act. The petitioner Federation entered into a contract with the opposite-party Ram Samujh Tewari on 9th February, 1959. When certain disputes arose, under cl. (15) of the contract, the Federation referred it on 13th March, 1960 to the arbitration of the Deputy Commissioner,



Pratapgarh, who was the sole agreed arbitrator. The Deputy Commissioner made and signed his award on 7th March 1961 under which, he decreed a sum of Rs 13,667.29 as payable by Ram Samujh Tewari to the Federation. The parties are alleged to have been made aware of the award on 8th March, 1961, on which date, Ram Samujh Tewari signed it in person and his counsel Shri Rajeshwari Prasad Tripathi and the Federation's counsel Shri Manohar Prasad signed it as witnesses. There were some clerical mistakes in the award which were corrected by the arbitrator on 17th June, 1961. The award was registered on 19th June, 1961. The petitioner moved an application before the Civil Judge, Pratapgarh on 5th July, 1961, styled as an application under s 14 of the Act, wherein it was alleged that in spite of the award the opposite-party Ram Samujh Tewari had not made any payment towards the decretal amount awarded and, therefore, judgment be pronounced according to the award. No prayer, however, was made for the issue of any discretion by the Court requiring the arbitrator to file his award and the connected documents in Court, as contemplated by s 14(2) of the Act. Notice was issued to Ram Samujh Tewari who filed an objection purporting to be one under s 33 of the Act challenging the award on various grounds, but not pleading either that the application was not maintainable in the absence of a prayer for the issue of the direction for the filing of the award or that it was barred by limitation. The Federation filed a replication on 9th December, 1961. It also moved an application under O XIII, r 1, Code of Civil Procedure on 3rd January, 1962 for summoning the award and its connected papers. The Deputy Commissioner caused the award to be filed on 7th February, 1962. Ram Samujh Tewari filed a fresh objection on 7th March, 1962. He

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again challenged the award on merits but took a further plea that the award was 'being filed beyond time' and was 'illegal and invalid'. The maintainability of the application as an application under s 14 of the Act was not challenged on this occasion also. This was done by another application which was moved on 12th March, 1962 and it was pleaded therein that the Court had no jurisdiction to pronounce any judgment inasmuch as the application had not been made in accordance 'with the provisions laid down in s 14' and was 'not maintainable in law'.

The learned Civil Judge held that the application was not maintainable for the reasons that there was no prayer for the issue of a direction by the Court for the filing of the award, that such a prayer was made for the first time on 31st January, 1962 but that was beyond the period of limitation which had commenced on 8th March, 1961 when either the parties or the counsel had signed the award, and in such circumstances, there being no compliance with the provisions contained in s 14(2) of the Act, the application itself was not maintainable.

The Federation filed a revision against this order in this Court. It was heard by the Chief Justice who referred it to this Full Bench because of apparent conflict between two Division Bench decisions reported in *Shri Ram v Shripal Singh* (1) and *Hazi Rahmatulla v Chaudhari Vidya Bhusan* (2).

The first argument of the learned counsel for the petitioner is that limitation has still not started running and, therefore, his application dated 3rd January, 1962 praying for the issue of a direction by the Court requiring the arbitrator to file the award in Court, or for that matter an application that he may choose to make even at the time of arguments, could not be beyond limitation, when the *terminus a quo* was

(1) A I R 1957 All 106

(2) A I R 1963 All 602

still not in the picture, Art 178, Indian Limitation Act, 1908, is applicable to the instant case. Under this Article, an application under the Arbitration Act, 1940 for the filing in Court of an award has to be made within 90 days "from the date of service of the notice of the making of the award". There can be no two opinions that the phrase "the notice of the making of the award" can have reference only to s 14(1) of the Act. That section says that when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and the signing thereof and the amount of fees and charges payable in respect of the arbitration and award. When under col (1) of Art 178, Indian Limitation Act, 1908, the Legislature refers to applications 'under the Arbitration Act, 1940', the notice of the making of the award, referred to in col 3 of that Article, can have reference only to the giving of notice in writing mentioned in s 14(1) of the Act.

The next question is whether or not the arbitrator gave any notice to the parties to the dispute. It is the admitted case of the parties that no such formal notice was given. However, the contention of the learned counsel for Ram Samujh Tewari is that the signing of the award on 8th March, 1961 by Ram Samujh Tewari in person and by Shri Manohar Prasad, counsel for the Federation, amounts to notice both under Art 178, Indian Limitation Act, 1908 and also under s 14(1) of the Act. Reliance has been placed on *Ganga Ram v Radha Kishan* (1). In that case both parties had signed the award. KHOSLA, J took the view that the period of limitation would commence from the date on which the parties had signed the award because they came to know of the existence of the award from that date and that knowledge on their part would amount

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to notice. This *ex parte* decision by KHOSLA, J was overruled after restoration, by a Division Bench of the Punjab High Court in *Ganga Ram v. Radha Krishan* (1). The Division Bench observed that the mere fact that the parties had signed the award will not "bring the case within s 14(1) of the Act". In *Misri Lal v Bhagwati Prasad* (2), the view taken was that the date of the award, or the knowledge of the award, would not be the starting point of limitation and instead the starting point would be the date of the service of the notice. It was further observed that if a party does not receive a notice of the award, as prescribed by law, he would evidently be within his right to wait for the receipt of such a notice and if he finds after some time that no notice has been received by him, it would be open to him to make an application for the filing of the award even if no notice has been received, but in all such cases, the application would not become barred by time unless it is presented more than 90 days after the receipt of a written notice of the award. To the same effect is the decision of the Patna High Court in *Jagdish Mahtan v Sunder Mahtan* (3) which says that time will not run against an applicant till a written notice has been served upon him as required by s 14(1) of the Act. In *P Ramulu v N Appalaswami* (4), the Andhra Pradesh High Court held that the terminus *quo* is the service of the notice of the making and the signing of the award, and the mere fact that the award came to the knowledge of the parties would not dispense with the necessity of service of notice in order to invoke the penalty of dismissal under Art 178, Limitation Act. In *Ratnawa v Gurushiddabba* (5), also, the award had been read out to the parties and their signatures obtained. But no notice of the making and

(1) A I R 1955 Pun 145

(3) A I R 1949 Pat 398

(2) A I R 1955 All 578

(4) A I R 1957 A P 11

(5) A I R. 1962 Mys 188

signing the award as such had been issued to them. In such circumstances, it was held that time will not begin to run until the parties had been notified by means of a notice in writing as contemplated under s 14(1) of the Act.

I have mentioned elsewhere that s 14(1) of the Act requires that after the arbitrators or umpire have made their award, and after they have signed it, they have to "give notice in writing to the parties of the making and signing thereof". S 42 of the Act says that any notice required by it to be served by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either (a) by delivering to the person on whom it is to be served, or (b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in India and registered under Chap VI of Indian Post Office Act, 1898. The notice under s 14(1) is a notice required by the Act to be served by the arbitrators or the umpire. That being so, service must be made primarily in accordance with the mode of service agreed to between the parties in their arbitration agreement, and if there be no provision in the arbitration agreement, then in either of the two manners prescribed by s 42 of the statute itself. It is not disputed that the notice was not sent by post. Nor is it disputed that no mode of service is stipulated in the agreement. The contest is that it was served in the manner mentioned in cl (a) of s 42. I am afraid compliance with cl (a) was also not made. When the statute prescribes the mode in which a thing is to be done, it must be done in that manner, and cannot be done in any other manner. The words used in s 14(1) are "shall give notice in writing" and the words need in s 42 are "shall be

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served. The mode of service in cl (a) is by delivering to the person on whom the notice is to be served. To my mind, the verbs "serve" or "deliver" imply a written notice to start with and which notice should be physically handed over to the affected parties. The word "give" cannot imply "take". In the instant case, no notice was given, no notice was served, no notice was delivered, and what was done was the mere obtaining of the signature of Shri Manohar Prasad, counsel, for the Federation and that also in his capacity as a witness. Let me assume that the Federation's counsel came to have knowledge on 8th March, 1961, and through him it must be taken that the Federation also acquired knowledge of the making and the signing of the award on that date. Limitation under Art 178 however, does not start from the date of knowledge but from "the date of service of the notice of the making of the award". Knowledge will not be the terminus *a quo*. The starting point of limitation will be the date of service of the notice in writing. It is quite true that what will be considered a sufficient notice in writing of the making and the signing of the award will be a question of fact in each case. In *Parasamka Commercial Co Ltd v Union of India* (1), then Lordships of the Supreme Court observed thus:

"Reading the word 'notice' as we generally do, it denote merely an intimation to the party concerned of a particular fact. It seems to us that we cannot limit the words 'notice in writing' to only a letter. Notice may take several forms. It must, to be sufficient, be in writing and must intimate quite clearly that the award has been made and signed. In the present case, a copy of the award signed by the arbitrator was sent to the company. It appears to us that the company had sufficient

notice that the award had been made and signed . . . A written notice clearly intimating the parties concerned that the award had been made and signed, in our opinion, certainly starts limitation "

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No such notice, as observed earlier, was ever sent to any body

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To sum up, I am in agreement with brother JAGMOHAN LAI that no notice was sent as required by s 14(1) of the Act and consequently, there could be no question of limitation starting running or having run out. In that view of the matter, the application dated 31st January, 1962 must be taken to be within the period of limitation as no notice had been served even by that date

The second point pressed by the learned counsel for the petitioner is that once the award was filed by the arbitrator on 7th February, 1962, the learned Civil Judge had no opinion left but to proceed to give notice of the filing of the award and then either to modify or correct the award under s 15, or to remit it under s 16 or to set it aside under s 33, read with s 30, or to pass judgment in term of the award under s 17 of the Act. Once the award is filed by the arbitrators or the umpire it cannot be ignored or brushed aside. There can be no question of limitation when the award is filed by the arbitrators or the umpire *suo motu*. Art 178 applies to an application for the filing of the award and not to the act of filing of the award. Likewise, limitation can have relevance against a party to the limitation and not to an arbitrator or umpire who is not a party thereto. Art 178 has no application where the award is filed by the arbitrator or umpire or where the Court itself summons it. I need not cite many au-

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authorities as only a few will suffice. See *Mohammad Yusuf v Mohammad Husain* (1), *Nathuram Girwar-chand v Baijnath Mangakhan Lal* (2) and *Champalal v Most Samrath Bai* (3). In *Parasramka Commercial Co Ltd v Union of India* (4), the award was made on 26th April, 1950, the application under s 14(2) was made on 30th March, 1951 for making the award rule of the Court. The arbitrator sent the original award to the Court on 31st July, 1951. The application under s 14 was held as barred by limitation. Nevertheless their Lordships of the Supreme Court observed that the award could not be ignored. They summarised the position thus:

"But we make it clear that the other part of the case, namely, what is to happen to the award sent by the arbitrator himself to the Court has yet to be determined and what we say here will not affect the determination of that question. Obviously enough that matter arises under the second sub-section of section 14 and will have to be considered quite apart from the application made by the company to have the award made into rule of Court."

In view of what I have said on these two points, which by themselves are sufficient for the disposal of the revision, I need not enter into the other controversies raised at the bar.

The learned Civil Judge, was therefore in error in holding that the application was not maintainable. The result is that I agree with my learned brothers with regard to the order proposed by them.

(1) AIR 1964 Mad 1

(2) AIR 1959 MP 422

(3) AIR 1960 SC 620.

(4) AIR 1970 SC 1654



JAGMOHAN LAL, J —I had the benefit of going through the judgment prepared by my learned brother O. P. TRIVEDI, J. I agree with him that this revision should be allowed and a decree be passed in favour of the petitioner in accordance with the award, along with costs in the lower court as well as in this Court.

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I, however, feel it necessary that a few more material facts of this case should be noticed besides those recorded by brother TRIVEDI in his judgment. I am also unable to agree with him in respect of certain observations made by him as to the scope of Art. 178 of the Limitation Act, 1908. I, therefore, propose to record my self-contained judgment.

The facts of this case are that the petitioner District Cooperative Development Federation Ltd., Pratapgarh, and the opposite-party Ram Samujh Tewari entered in a transaction, the terms of which were reduced to writing in the form of an agreement which contained an arbitration clause that if any dispute arose between the parties in relation to that transaction the same shall be referred to the Deputy Commissioner, Pratapgarh for his arbitration. Some dispute having arisen, the same was referred to the said arbitrator who after hearing the counsel for the parties made and signed his award on 7th March, 1961. The counsel for the parties also subscribed their signatures to this award on 8th March, 1961. On 16th June, 1961 another document was executed by the arbitrator correcting some clerical mistakes in the award. Both the documents were then presented before the Sub-Registrar on 19th June, 1961 and they were duly registered under the Registration Act. Under the award a sum of Rs.18,667.29 was payable by the opposite-party to the petitioner.

On 5th July, 1961 the petitioner submitted an application captioned as under s. 14 of the Arbitration Act

to the Civil Judge, Pratapgarh. The application was made on a court-fee stamps of Rs 200 as prescribed by Art 18 of Sch II to the Court Fees Act as amended in its application to this State. This application which was presented on the re-opening day of the courts after Civil Court vacation was also within 90 days rule of limitation prescribed by Art 178 of the Limitation Act, 1908. This period has been cut down to 30 days under Art 119 of the new Limitation Act, 1962. But, since this case is governed by the old Limitation Act the reference in this judgment has been made only to that Act. The relief that was prayed for in this application was that the award made by the Deputy Commissioner, Pratapgarh be made rule of the Court and a decree for the amount, awarded by the arbitrator, be passed against the opposite-party along with costs.

This petition was registered as Regular Suit no 6 of 1961 under s 11(2) of the Arbitration Act, as required under the General Rules (Civil). Notice was issued to the opposite-party who filed an objection on 14th November, 1961 attacking the award on merits, but without raising any objection to the maintainability of that application in which there was no specific prayer for the filing of the award. The petitioner filed a replication against it on 9th December, 1961 and then 16th January, 1962 was fixed for issues. In the meantime on 31st January, 1962 the petitioner made a routine application for summoning of witnesses in which it was prayed that the award and other connected papers be summoned from the Deputy Commissioner, Pratapgarh. This application was allowed on the same day and on 4th January, 1962 a summon was issued to the Deputy Commissioner to file the award and other papers. The award and the connected papers were filed by the Deputy Commissioner through some clerk of his office on 7th February, 1962. The

parties were informed of the filing of the award and they were required to file objections, if any, within a month

On 7th March, 1962, the opposite-party filed his objections attacking the award on merits and also alleging that the award was filed beyond time and was illegal and invalid. He prayed that the award may be set aside. But, even at that time there was no specific plea that the application dated 5th July, 1961 made by the petitioner was not maintainable. On 12th March, 1962 the opposite-party filed another application in which it was alleged for the first time that the petitioner's application dated 5th July, 1961 was not maintainable inasmuch as it was not in accordance with the provisions of s 14 of the Arbitration Act (to be hereinafter referred as the Act). It was also pleaded that the Court had no jurisdiction to pass a decree on the basis of this application and it was prayed that a preliminary issue about the maintainability of that application be framed and decided as a preliminary point.

The Court framed issues covering this preliminary point as well as the other pleas raised by the opposite-party attacking the award. All the issues were then decided by the Civil Judge under his judgment dated 30th July, 1962. He overruled the pleas of the opposite-party attacking the award on merits. But, on the preliminary point he recorded a finding against the petitioner. He was of the opinion that the application dated 5th July, 1961 by itself, though presented within the time prescribed by Art 178 of the Limitation Act, was defective inasmuch as no prayer for issue of a direction to the arbitrator to file the award had been made in it and such a prayer was made by the petitioner only in his subsequent routine application dated 3rd January, 1962. The two applications

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taken together fulfilled the requirement of law, but by the time the subsequent application was made the limitation prescribed by Art 178 of the Limitation Act had run out. The learned Civil Judge was, therefore, of the opinion that the direction issued by him on this application dated 3rd January, 1962 to the arbitrator to file the award was without jurisdiction and the subsequent proceedings, including filing of the award by the arbitrator in compliance with this direction, were also irregular and invalid. He accordingly dismissed the petitioner's application dated 5th July, 1961 for making the award a rule of the court. It is against this order that the revision has been filed.

The procedure for arbitration without intervention of a Court is given in Chap II of the Act. After an award has been made and signed, the arbitrator has to give notice in writing to the parties of making and signing of the award as required by s 14(1) of the Act. A party who wants to have the award set aside has to make an application to the competent court under s 14(2) of the Act praying for the filing of the award if the award has not already been filed up to that time by the arbitrator either of his own accord or at the request of any party to the arbitration. Such an application has to be made within 90 days of the service of notice on that party of the making of the award as required by Art 178. The court-fees payable on that application is on a graded scale according to the value of the award subject to a maximum of Rs 200 when the value exceeds Rs 10,000 as prescribed by Art 18 of Sch II to the Court Fees Act. After the award has been filed the Court has to give a notice to the parties as provided in s 14(2) of the Act. Within 30 days from the receipt of this notice the party who wants to challenge the award and get it set aside has to make another application under s 33 of the Act. The pres-

cribed court-fees for such an application is also the same as for an application for filing of the award

If a party in his application for filing of the award also combines a prayer for setting aside the award, stating the grounds mentioned in s 30 of the Act on which he wants the award to be set aside, there can possibly be no legal objection to it subject to the application being within time and payment of the prescribed court-fees by the applicant. In such a case, it is not necessary for the party to make another application under s 33 of the Act after receiving the notice about the filing of the award, though it is permissible for him to do so even at that stage.

If, however, he makes only an application under s 33 of the Act for setting aside the award (which has not so far been filed in court) without making any prayer for filing of the award, such an application is premature and liable to be rejected, as was held by the Bombay High Court in *Ratanji Virpal & Co v Dhunjal Manilal* (1), and by the Calcutta High Court in *Bengal Jute Mills v Jewraj Heeralal* (2).

Now, a person who relies on the award and wants it to be made a rule of the Court has to follow the same procedure with a slight difference. All that he is required to do is to make an application under s 14 of the Act for the filing of the award within the time prescribed by Art 178 and bearing the court-fees as provided in Art 18 of Sch II to the Court Fees Act. After the award has been filed and the objections, if any, filed by the other side against the award have been rejected, the court shall proceed to pronounce judgment according to the award and pass a decree making the award a rule of the Court as required by s 17 of

(1) AIR 1942 Bom 101

(2) AIR 1944 Cal 304

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the Act even without that party making any application to that effect. It was held by the Madhya Pradesh in *Sheoram Prasad Ram Narayan Lal Bania v Gopalprasad Parmeshwardayal Shukla* (1) that the Court may *suo motu* pass a decree under s 17 of the Act even though no application has been filed by either party for the purpose. There is, however, no legal bar to that party making a specific prayer for passing a decree in terms of the award either in his original application made under s 14 of the Act for the filing of the award or at a subsequent stage, though such a prayer on his part is not mandatory as it is with regard to a party who wants to avoid the award.

There may be a case in which a party simply prays that the award, which has not been filed in court until then, be made a rule of the Court without making a specific prayer that the arbitrator be directed to file the award. Strictly speaking, such an application can be rejected by the Court unless it deems fit to allow the applicant to amend his application by incorporating in it that prayer. If, however, such an application is not rejected by the Court *in limine* and it is entertained and proceedings are started on its basis and in the meantime the award is filed in Court by the arbitrator, the occasion for dismissing that application does not arise. The award has to be disposed of according to the provisions contained in Chap II independently of such application. It may be stated that there is no limitation prescribed for the filing of the award by the arbitrator either of his own accord or at the request of any party and the time prescribed by Art 178 of the Limitation Act does not apply to it. There are numerous decisions of the various High Courts including this Court to support this proposition.

(1) A I.R. 1959 M P 102

Reference may be made only to a Division Bench decision of this Court in *Dwarka Das v Pearay Lal* (1), in which it was held that where the arbitrator himself files an award, though at the request of a party, he need not make any application and he can simply file the award and Art 178 of the Limitation Act will have no application to it. The Supreme Court has also ruled in *Champalal v Mst Sammathbai* (2), that Art 178 of the Limitation Act does not apply to the filing of the award by the arbitrators. The contrary opinion expressed by a Bench of Patna High Court in *Rambilas Manle v Babu Durga Bijai Prasad Singh* (3), which was dissented from in a subsequent decision by another Bench of the same High Court in *Mohammad Hasan v Mohammad Anwar Ahmad* (4), cannot be deemed to lay down correct law in view of the above Supreme Court decision. In fact the very language of Art 178 shows that it applies to an "application" for filing of the award. The application contemplated by this Article is the application made by a party containing a prayer under s 14(2) that the arbitrator be directed to file the award. So far as the arbitrator is concerned he may simply send the award or produce it before the Court without making any application.

Likewise this limitation also does not apply to the issue of a direction by the Court to the arbitrator to file the award. Such a direction can be issued by the Court even after the expiry of 90 days from the service of notice of making and signing of the award. If a party makes his application under s 14(2) on the last day of limitation prescribed by Art 178, the direction has necessarily to issue after this limitation of 90 days and the award can be filed still later. So it is not correct to say that an arbitrator can file an award on

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(1) AIR 1949 All 234  
(3) AIR 1965 Pat 289

(2) AIR 1960 SC 629  
(4) AIR 1968 Pat 82

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the request of a party only within 90 days' rule of limitation prescribed by Art 178, though of his own accord he can do so even after that period

In *Puresamka Commercial Co Ltd v Union of India* (1) the party which relied on an arbitration award made an application to the court under s 14(2) read with s 17 of the Act for making the award a rule of the court, but on the date on which this application was made it was barred by limitation prescribed by Art 178 of the Limitation Act. While the application was pending the arbitrator sent the original award to the court. The application was ultimately rejected as time-barred. When the matter was taken in appeal to the Supreme Court that Court also agreed with the trial court and the High Court that the application under s 14 of the Act was time-barred and hence it had been rightly rejected, but at the same time it was held that the award which had been sent by the arbitrator himself to the Court had still to be disposed of independently of this application according to the procedure prescribed by Chap II of the Act. For that purpose, the case was sent back to the trial court without expressing any opinion whether fresh objections could be raised by the other party in answer to the award filed by the arbitrator.

Lastly, we come to a case like the present one in which the application made by a party contains only a prayer for making the award a rule of the Court without making a specific prayer for a direction being issued to the arbitrator to file the award and such application is entertained by the Court and on its basis direction is issued to the arbitrator. If the arbitrator files his award in compliance with such direction, the



award cannot but be deemed to have been validly filed within the meaning of s 14(2) of the Act. Ordinarily, the Court shall issue such direction on the application of a party. But there is no bar to the court issuing such direction *suo motu*. S 14(2) does not in terms provide that the Court shall direct an arbitrator to file his award only on an application made to this effect by a party and cannot do so *suo motu*.

So far as the jurisdiction of the Court is concerned, once a party invokes the jurisdiction of the competent Court by making a prayer that an award be made the rule of the Court or it be set aside, the Court has full jurisdiction to pass any order including the issue of a direction to the arbitrator to file the award, for disposing of that prayer, if it does not choose to reject that application *in limine*. It is the settled law that under O 7, r 7 of the Code of Civil Procedure which is applicable to arbitration proceedings also by virtue of s 41 of the Act, the court has a discretion to mould the relief prayed for by a suitor suitably according to the requirements of the case and to grant any other relief in lieu of or in addition to the relief prayed for.

In *Ganga Ram v Radha Kishan* (1), an application purporting to be under s 17 was treated in substance as one under s 14(2). But since it was made beyond the time prescribed by Art 178, it was dismissed as time-barred.

In *Lackshmi Prasad v Gobardhan Das* (2), an application purporting to be under s 33 was treated as one under s 14(2) and notice was issued to the arbitrators who in response to that notice produced in Court the entire proceedings including the award. After that the applicant sought for and was allowed to withdraw himself from this application. The other party then

(1) AIR 1962 Pun 350

(2) AIR 1948 Pat 171

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requested the Court to make the award a rule of the court which was objected to by the first party. The trial Court refused this prayer on the ground that the award had not been filed in the manner laid down in s 14(2). But in appeal the High Court of Patna held that the application of the other party under s 33 was not tenable until the award had been filed, but since the award had come before the court in compliance with a notice issued by it, it should have been disposed of according to law.

Learned counsel for the opposite-party relies on a Bench decision of this Court in *Amod Kumar Verma v. Hari Prasad Barman* (1), in which it was observed at p 721 of the report that when a definite procedure from the filing of an award up to the making of a decree is laid down in the Chapter dealing with arbitration without intervention of a Court and it contains no provision expressly allowing a decree to be passed in any other manner, it follows that a decree can be passed under s 17 only in a case starting with the filing of the award or with an application for the filing of the award under s 14.

I am in respectful agreement with this observation in so far as it is the correct procedure which should ordinarily be followed by a party which relies on an award. The facts of this case were very peculiar. An award was made by the arbitrator on 21st September, 1946, of which notice was given to the parties on 23rd September, 1946. On 22nd November, 1946 one of the parties to the agreement filed a suit praying for decree on the basis of the award and on his motion the Court appointed a Commissioner to seize the award from the arbitrator. A lawyer who was appointed a Commissioner went to the arbitrator and seized the

(1) A.I.R. 1958 All 720.

award from his possession. That suit was afterwards dismissed in default and nobody applied for restoration of that case or for any other action being taken on the basis of the award in that suit. Therefore, another suit was filed by another party on 16th December, 1946 praying that the award may be made a rule of the court. In this suit also all the interested parties were impleaded. Later on the counsel for the plaintiff made a statement that since the award had already been filed in the previous suit, the purpose of the suit had been achieved and the relief of making the award a rule of the court had become superfluous and nothing remained to be done in that suit. The Court then held that the award which had been filed in another case could not be made a rule of the Court in the second suit and besides that the plaintiff did not want it to be made a rule of the Court and so nothing remained to be done in that suit which was accordingly dismissed. In the meantime, two other parties to the agreement filed two separate suits for setting aside the award under s. 33 of the Act. These suits were resisted by the party who had filed the previous suits for making the award a rule of the court. The award which was still on the record of the first suit was requisitioned from the record room. The trial court refused to set aside the award and passed an order that a decree be passed in terms of the award. On an appeal filed against that decree, this Court partly allowed the appeal and set aside the order of the trial court in so far as the award was made a rule of the court. It was observed in this case that the law contemplates that a decree will be passed on the basis of the award in the ordinary course unless it is set aside or remitted. Once an award has been filed in court, the law will take its course and a decree will be passed if the award is found to be in order. But, in that case the award had not been filed

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in any of the modes contemplated by s. 14(2) of the Act. It was not clear whether the arbitrator voluntarily handed over the award to the Commissioner or the same was attached from his possession. If the Commissioner seized it and then filed it in court, it cannot possibly be held that the arbitrator caused it to be filed. Even in the second suit it had been held that the award had not been filed for the purposes of that suit as contemplated by s. 14(2) of the Act. So in that third suit, it could not be held by any stretch of imagination that the award had been filed in the manner provided in s. 14(2) of the Act on the basis of which a decree could be passed under s. 17 of the Act.

In *Sri Ram v. Sripal Singh* (1), a party who relied on an award made on 15th November, 1948 filed a suit on 12th February, 1949 for passing a decree in terms of the award. During the pendency of the suit, the award was filed in Court by one of the arbitrators on 2nd December, 1949. The trial court held that the award had been duly made and there was no flaw in it. The suit was accordingly decreed and a decree in terms of the award was passed on 9th December, 1949.

When the other party went in appeal a Bench of this Court held that in view of s. 32, a suit was not maintainable and the party who desired a decree to be passed in terms of an award ought to have filed an application under s. 14 containing a prayer that the arbitrators be asked to file the award. It was, however, observed that if the appellant had taken an objection in the court below that the suit was not competent because an application should have been made under s. 14 of the Act, the objection could have been met by means of a simple application asking for an amendment of the plaint and treating it as an application.

(1) 4 I R 1957 All 106

under s 14. Such amendment would have been allowed since the plaint was filed within the time prescribed by Art 178. The Bench further observed that had this been the only irregularity in the proceedings of the court below, it would not have interfered with the order passed by the court. But there was another irregularity noticed by the Bench which was that the decree was passed by the trial court on 9th December, 1949, while the award was filed on 2nd December, 1949 and so 30 days' time was not allowed to the other party for filing objections and making an application under s 33 for setting aside the award. On this ground the decree of the court below was set aside, but the case was remanded with the direction that the trial court shall allow the appellant to file an application within 30 days to set aside the award. The court will then consider this application of the appellant and treating the plaint of the respondent as an application under s 14 of the Act, decide the matter according to law. This decision which on its facts is quite correct, if I may say so with all respects, also supports the above proposition that the court has a discretion to treat an application (plaint in that case) purporting to be under s 17 as an application under s 14 and proceed accordingly, provided that application has been made within the limitation prescribed by Art 178.

In *Haji Rahmatulla v Chaudhary Vidya Bhushan* (1), an award was made on 17th January, 1955. One of the parties to the arbitration agreement, who relied on the award, filed the award in the proper Court on 22nd March, 1956 and prayed that the award may be made rule of the court. No objection was raised by the opposite-party that the award had not been properly filed by the plaintiff in the court nor was it suggested that, when the plaintiff filed the award, he filed

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it surreptitiously and that there was no authority by the arbitrator that the plaintiff should file the award. Under these circumstances, it was held the plaintiff filed the award under the authority of the arbitrator and as no time was prescribed during which the arbitrator could file or cause it to be filed in the court, the filing of the award could not be said to be beyond time. The application made by the plaintiff praying that the award be made the rule of the court was in substance an application under s 17 of the Act though wrongly purporting to be under s 14(2) of the Act. Neither the Limitation Act nor the Arbitration Act prescribed any specific period of limitation for such an application under s 17 of the Act and so no question of limitation could arise in respect of that application unless it was held that it was governed by Art 181, the application made by the plaintiff on 22nd March, 1956 was well within time, the award having been made on 17th January, 1955.

I am in respectful agreement with this decision on the facts of that case. The point which is relevant for the purposes of the present case is that in this case also it was held that it was open to the court to treat an application purporting to be under s 14(2) of the Act to be one under s 17 of the Act if no direction of the court was necessary calling upon the arbitrator to file the award. Since in that case it was found that the plaintiff had filed the award under the authority of the arbitrator a direction as contemplated under s 14(2) of the Act was not called for. All that the plaintiff could do was to pray for the passing of a decree on the basis of the award. Such a decree could have been passed in due course of law even in the absence of a specific application to this effect by the plaintiff.

From the above discussion it is evident that there is actually no conflict in the aforesaid decisions of *Shri Ram v Sripal Singh* (1) and *Haji Rahmatulla v Ch Vidya Bhushan* (2), each of these decisions has been made correctly, and I say so with all respects, on the facts of that case. But none of these decisions is of much help for the decision of the present case except to support the proposition that the court has a discretion to treat an application purporting to be under s 17 as one under s 14(2) and *vice versa* if the circumstances of the case so require and no question of limitation is involved.

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Now coming to the facts of the present case, it is clear that the application made by the petitioner on 5th July, 1961 was captioned as one under s 14 of the Act. The court-fees that was paid by him was the proper court-fees prescribed for such an application under Art 18 of Sch II to the Court Fees Act. The application was within the time prescribed by Art 178, assuming that time had started running under this Article from the date on which the counsel for the petitioner subscribed his signature to the award. It did not contain a specific prayer for issue of a direction to the arbitrator to file the award and only contained a prayer for making the award a rule of the court which was the ultimate stage of the disposal of the award after it had been filed. This ultimate prayer implied in it a prayer for issue of a direction for filing of the award. The application was neither rejected *in limine* nor any objection taken by the other party to its competency. The court issued a direction to the arbitrator and in obedience thereto he sent the award and the proceedings to the court. This direction, even though not strictly in accordance with the procedure contemplated by Chap II, cannot be said to be without juris-

(1) AIR 1957 All, 106

(2) AIR 1960 All 602

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diction In this view of the matter, even if we altogether put out of consideration the routine application dated 3rd January, 1962 made by the petitioner, it can be presumed that the court of its own accord thought fit to issue a direction on 4th January, 1962 to the arbitrator to file the award. It had the jurisdiction as well as the discretion to issue such a direction and the award filed in pursuance of such direction cannot but be deemed to have been validly filed within the meaning of s 14(2) of the Act.

If, on the other hand we think that this direction was issued by the court in pursuance of the routine application dated 3rd January, 1962, made by the petitioner for summoning the award and other connected papers from the arbitrator, this application has to be treated as a part of the original application, dated 5th July, 1961. In this routine application the petitioner had made explicit what was already implicit in his original application which was admittedly within time prescribed for making an application under s 14(2).

Lastly, it has been argued by the learned counsel for the petitioner that even if this routine application dated 3rd January, 1962 is taken in isolation divorced from the original application dated 5th July, 1961, that too cannot be said to be barred by limitation on the date on which it was made. It is pointed out that in this case no notice in writing was ever sent by the arbitrator to the parties as contemplated by s 14(1) of the Act as such limitation under Art 178 did not start running. As stated earlier in this judgment, what happened in this case was that after the award had been made and signed by the arbitrator on 7th March, 1961, it was attested by the counsel for the parties on 8th March, 1961 as witnesses nos 1 and 2. The learn-



ed counsel for the opposite-party contended that the showing of the original award to the counsel for the parties and their subscribing their signatures to it on 8th March, 1961 was sufficient compliance of the requirement of giving a notice in writing as contained in s 14(1) of the Act. In support of his contention to be relied on a decision of the Supreme Court in *Parasramka Commercial Co Ltd v Union of India* (1), in which it was held that what will be considered a sufficient notice in writing of the making and signing of the award is a question of fact. It was further observed by their Lordships of the Supreme Court that the words "notice in writing" cannot be limited to only a letter. Notice may take several forms. It must, to be sufficient, be in writing and must intimate quite clearly that the award has been made and signed. In that case a copy of the award signed by the arbitrator was sent to the party concerned and it was held as sufficient notice in written within the meaning of s 14(1) of the Act. The learned counsel for the petitioner argued that even in this decision it had been held that something in writing should be given to the parties to constitute "a notice in writing" within the meaning of s 14(1) of the Act though it is immaterial in what form that writing is. In that case copies of the award were sent to the parties while in the present case nothing in writing was given to them, the emphasis being on the word 'given' within the meaning of s 14(1) read with s 42 of the Act. If the award had been executed in triplicate and one copy had been given to each of the parties on 8th March, 1961, when the counsel for the parties were required to subscribe their signatures to the original award as attesting witnesses, the requirement of s 14(1) of the Act would have been fulfilled in the view of the above decision of the Supreme Court, but without the physical deli-

(1) AIR 1970 SC 1654.

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serv of anything in writing to the parties or their counsel, the mere subscription of the signatures of the counsel for the parties to the award does not fulfil the requirement of s 14(1) of the Act so as to allow the time under Art 178 of the Limitation Act to run from that date

In *Mish Lal v Bhagwati Prasad* (1), it was held by a Division Bench of this Court *vide* headnote (h) of the report at p 574

"The starting point of limitation under Art 178 amended in 1940 is the date of the service of notice and not the date of the award, or the knowledge of the award

If a party does not receive a notice of the award as prescribed by law [s 14(2), Arbitration Act] he would evidently be within his rights to wait for the receipt of such a notice and if he finds after some time that no notice has been received by him, it would be open to him to make an application for the filing of the award even if no notice has been received, but in all such cases the application would not become barred by time unless it is presented more than 90 days after the receipt of written notice of the award "

Similar view was expressed by a Bench of the Nagpur High Court in *Chauthmal Jivajee Podder v Ramchandia Jivajee Podder* (2). The headnote (d) of this report runs as follows

"Under Art 178 time begins to run from the date of the service of the notice of the making of the award. The notice contemplated by Arbitration Act has to be served as required by s 42 of the Act. S 14 has to be complied with strictly and any other compliance thereof would not make limitation run under Art 178 "

(1) A I R 1956 All 573

(2) A I R 1955 Nag 126,

In that case arbitrators sent a notice to the parties that the award would be pronounced on 13th June, 1944. The award was made on that date and signed in the presence of the parties who were asked to sign the order sheet in token of their knowledge. One of the parties applied on 13th November, 1944 to the Court for directing the award to be filed and to pass a decree in terms of the award. On an objection by the other party that the application was time-barred it was held that though the award was made on 13th June, 1944 in the presence of all the parties concerned, there was no notice in writing of the making and signing of the award and the signatures on the order sheets in token of their presence before the arbitrators, could not take the place of the notice contemplated by the Arbitration Act. Therefore, time did not begin to run against the plaintiff and the application was not barred by time.

It may be stated that this decision was given by Hidayatullah, ACTING C J (as his Lordship then was) speaking for the Division Bench and the decision in *Parasramka Commercial Co Ltd v Union of India* (1) was also given by him speaking for the Bench of the Supreme Court.

In this view of the matter, limitation cannot be said to have started running under Art. 178 and as such even the routine application dated 3rd January, 1962 in which a specific prayer was made by the petitioner for summoning the award and other connected papers from the arbitrator, cannot be said to be barred by limitation. The view taken by the learned Civil Judge is erroneous. He was not justified in rejecting the prayer of the petitioner that the award may be made a rule of the court under s 17 of the Act, which was bound to do as a matter of course, after he had taken the prescribed steps on the award filed by the arbitrator in compliance with the direction issued by him, and had overruled the objections against the award filed by the opposite-party.

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(1) AIR 1970 SC 1654.

5 ILC (ILLR) 1973-14

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It may also be stated that if the learned Civil Judge had rejected the petitioner's application at the initial stage without summoning the award from the arbitrator, as the technical ground that it did not contain a prayer that the arbitrator be directed to file the award, the petitioner had an alternative remedy open to him. Assuming that a fresh application containing this specific prayer was barred by limitation under Art 178 of the Limitation Act, all that he need have done was to persuade the arbitrator to file the award, and if the arbitrator had filed the award, it would have been made a rule of the court in due course after the objections of the other side had been overruled by the learned Civil Judge. By rejecting the prayer of the petitioner, at that late stage, after the award had already been filed by the arbitrator in obedience to the summons issued by the court for that purposes, the learned Civil Judge deprived the petitioner of that course also. So the order passed by him is manifestly unjust.

The revision should, therefore, succeed.

BY THE COURT —We allow the revision, set aside the order of the lower court dated 30th July, 1962 and grant a decree in favour of the petitioner in terms of the award, which will be made rule of the Court, with costs in the lower court and in this Court against the opposite-party.

*Revision allowed*

## APPELLATE CIVIL

*Before Mr Justice G C Mathur and Mr Justice  
H Swarup*

JAMUNA DASS

APPELLANT,

v.

BOARD OF REVENUE

AND OTHERS

RESPONDENTS

1973

April, 18

**U. P. Zamindari Abolition and Land Reforms Act, 1950, ss 171, 174 and 175 and Hindu Succession Act, 1956, ss 25 and 27—Bhumidhara and sirdari land—Succession—Ss 24 and 27 of the Hindu Succession Act, 1956 not applicable to inheritance under the Tenancy Act**

The law of succession contained in U P Zamindari Abolition and Land Reforms Act cannot be altered or changed in the statute itself. When the Legislature laid down a particular line of succession and did not provide for the exclusion of any one in that line on any ground, then it is not permissible to engraft exceptions or exclusions on the ground of equity, justice and good conscience. Rules of equity, justice and good conscience are applicable when the matter is not governed by the statutory provisions.

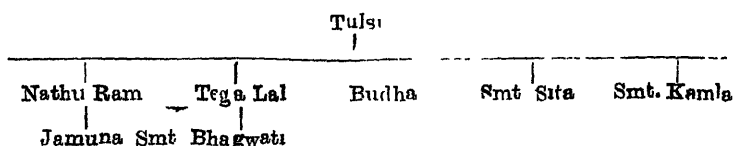
The provisions of ss 25 and 27 of Hindu Succession Act apply only to succession under that Act and not to succession under other enactments.

Special Appeal No 135 of 1966 from the judgment and order of S N SINGH, J, dated 28th February, 1966 in Civil Miscellaneous Writ No 3834 of 1962.

V K S Chaudhry, for the Appellant

K B Gang, for the Respondent

G C MATHUR, J —The relationship between the parties appears from the following pedigree table



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I ulsi owned some *sir* and *khudkasht* land and some tenancy land. Upon his death his three sons Nathu Ram, Tega Lal and Budha inherited these each getting a one-third share therein. In 1949 Tega Lal, Budha and Smt Sita were murdered. Tega Lal's one-third share was inherited by his widow Smt Bhagwati. Upon the death of Nathu Ram his one-third share was inherited by his son Jamuna. The dispute relates to the one-third share of Budha.

The *sir* and *khudkast* land as well as the tenancy land, however, remained joint. Upon the abolition of Zamindari the *sir* and *khudkast* became *bhumidhari* and the tenancy become *sirdari*. Jamuna filed two suits under s 176 of the U P Zamindari Abolition and Land Reforms Act for partition of the joint holdings. One suit was in respect of the *bhumidhari* holdings and the other was in respect of the *sirdari* holdings. Jamuna claimed a two-third share in both the holdings. The suit was resisted by Smt Bhagwati, the widow of Tega Lal. She set up a case that Nathu Ram, father of Jamuna had murdered Tega Lal, Budha and Smt Sita and, therefore, he and his son Jamuna were disqualified from inheriting the share of Budha. She asserted that Jamuna's share was only one-third which he had inherited from Nathu Ram. The two suits were connected and tried together. All the courts below have proceeded on the basis that upon the murder of Budha in 1949 his one-third share went to his sister Smt Kamla. Smt Kamla died in 1954. The trial court held that it was not proved that Nathu Ram had murdered Budha and, therefore, Nathu Ram or Jamuna were not disqualified from inheritance. It further held that on the death of Smt Kamla, Jamuna being the brother's son of the last male holder Budha, succeeded to her. Thus Jamuna was entitled to two-

third share. The trial court accordingly decreed the suits for a two-third share. Against the judgments and decrees of the trial court, Smt Bhagwati preferred appeals. The Additional Commissioner upheld all the findings of the trial court and dismissed the appeals.

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Smt. Bhagwati then preferred two second appeals before the Board of Revenue. The Board held that Nathu Ram had committed the murder of Budha, Teg Lal and Smt. Sita. It further held that on the death of Smt. Kamla her share in the *bhumidhari* plots as well as the *sirdari* plots would have devolved upon Jamuna but for the fact that Jamuna was disqualified from succession under Hindu law as he had succeeded, Nathu Ram who was a murderer. The Board of Revenue was of the view that the tenancy law was subject to the general provisions of the Hindu Law unless there was any specific provision to the contrary. It further held that the share of Smt Kamla devolved upon Smt Bhagwati and, therefore, Smt Bhagwati was entitled to a two-third share. The Board accordingly allowed both the appeals and modified the judgments and decrees of the trial and appellate courts and decreed the suits only for a one-third share. Against the judgment of the Board of Revenue a writ petition was filed by Jamuna.

At the hearing of the writ petition a preliminary objection was raised on behalf of Smt Bhagwati that one writ petition was not maintainable against the judgment of the Board of Revenue in two suits. Upon this, learned counsel for Jamuna made a statement that he pressed the writ petition only in respect of the *bhumidhari* plots and not in respect of the *sirdari* plots. The writ petition was accordingly confined to *bhumidhari* plots. The learned single Judge proceeded on the assumption that Smt Kamla acquired Budha's

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one-third share after his death in her own right and not by succession. He accordingly held that upon the death of Smt Kamla, the succession would be governed by s 174 of the U P. Zamindari Abolition and Land Reforms Act and that neither Smt Bhagwati nor Jamuna were the heirs of Kamla under that section. He further held that since Smt Kamla died heirless her share would go in equal shares to the co-tenure holders, namely, Jamuna and Smt Bhagwati. On this basis, Jamuna and Smt Bhagwati were held entitled to a half share each. The learned single Judge in this view allowed the writ petition, quashed the judgment of the Board of Revenue so far as *bhumidhari* plots were concerned and directed the Board to decide the appeal relating to *bhumidhari* rights in the light of his decision. Against the judgment of the learned single Judge, Jamuna has preferred this appeal.

Before considering the merits of the appeal we would like to dispose of two preliminary points. One of the grounds raised in appeal is that the statement of Jamuna's counsel at the hearing of the writ petition that he did not press the claim in respect of the *sindari* plots, was made without authority and was prejudicial to the interest of the appellant. The learned counsel for the appellant submitted that one writ petition was maintainable against the common judgment of the Board of Revenue in the two second appeals and, therefore, the erroneous concession of law made by the appellant's counsel at the hearing of the writ petition, should not be held binding on the appellant. In view of the decision of a Full Bench of this Court in *Mall Singh v Smt Laksha Kumari Khaitan* (1), one writ petition was maintainable against the judgment of the Board of Revenue in the two suits. In the counter-

(1) 1968 A I J 210 (F B)



affidavit filed to the writ petition, no objection as to the maintainability of one writ petition was raised. The objection was raised for the first time at the hearing of the writ petition. At that stage the learned counsel for the appellant, without taking any instructions from the appellant, made a statement that he did not press the writ petition in respect of the *sindan* rights. This statement was made on the erroneous view of the law that one writ petition was not maintainable in respect of the judgment in the two suits. Since no objection had been raised in the counter-affidavit, the learned counsel for the appellant had no opportunity of contacting his client and obtaining his instructions as to whether he would pay one more set of court-fee and if not, in respect of which property he would elect to press the writ petition. In these circumstances, we are of opinion that the erroneous concession made by the learned counsel for the appellant should not be held binding on the appellant. We have accordingly permitted the learned counsel for the appellant to press this appeal in respect of the suit for division of the *sindan* holding as well.

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An application has been filed under O 41, r 2 of the Code of Civil Procedure by the appellant for permission to add additional grounds to the memorandum of special appeal. The main ground sought to be added is that the Board of Revenue has erred in holding that Nathu Ram had murdered Budha as there was no evidence to support such a finding. Before the trial court a copy of the judgment of the Court of Session where Nathu Ram was tried for the murder of Tega Lal, Budha and Smt Sita, and was convicted for the same and sentenced to death was filed. Apart from this no other evidence was led in support of Smt Bhagwati's assertion that Nathu Ram had murdered these persons.

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Relying upon the decision of the Supreme Court in *Anil Behari Ghosh v Smt Latika Bala Dassi* (1), the trial court held that the judgment of the criminal court was not relevant to establish the fact that Nathu Ram had murdered his brothers and sisters. Since there was no other evidence on the question, the trial court held that it was not proved that Nathu Ram had committed the murders. The Additional Commissioner, for the same reasons, also held that Nathu Ram could not be held to be a murderer. The Board of Revenue, however, reversed this finding. It has referred to the judgment of the criminal court but has not referred to the decision of the Supreme Court. It has based its finding merely on the fact that in her written statement Smt Bhagwati had asserted that Nathu Ram had murdered Tega Lal, Budha and Smt Sita and that there was no denial of this assertion by Jamuna. In the writ petition, no special ground was raised regarding the finding of the Board of Revenue that Nathu Ram was the murderer of Tega Lal, Budha and Smt Sita. The learned single Judge has not referred at all to the question of the murder or its effect on the rights of the parties. He has based his decision entirely on the assumption, which in our opinion is not justified, that under s 174 neither Jamuna nor Smt Bhagwati were the heirs of Smt Kamla. In the grounds of appeal also no ground has been raised regarding this question apparently for the reason that the learned single Judge has not based his decision on the finding of the Board of Revenue. We do not consider it necessary to allow the appellant to raise this further question as in our opinion the question can be re-argued, if necessary, before the Board of Revenue when the second appeals are re-heard.

We now come to the merits of the appeal. The learned single Judge has proceeded on the assumption

that Smt Kamla had acquired the one-third share of Budha in her own right by prescription. We have gone through the judgments of the revenue courts and we do not find anything, thereto justify this assumption. The learned single Judge has further held that succession to Smt Kamla would be governed by s 174 of the U P Zamindari Abolition and Land Reforms Act and that under this section neither Smt Bhagwati nor Jamuna are heirs of Smt Kamla. The learned single Judge is not right in holding that Jamuna is not an heir of Smt Kamla under s 174. Under s 174 brother's son is an heir and Jamuna being a Brother's son of Kamla would be the heir under s 174. That being so, the further view of the learned single Judge that Smt Kamla died without leaving any heir and, therefore, the two co-tenure-holders, namely Smt Bhagwati and Jamuna would succeed to Smt Kamla's share by survivorship under s 175, is also erroneous. For these reasons, the judgment of the learned single Judge cannot be sustained.

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We have carefully examined the judgment of the Board of Revenue and we find that it suffers from manifest errors of law.

According to the Board, succession opened both to the *bhutnidhari* and *sirdari* rights on the death of Smt Kamla in 1954, that normally Jamuna nor brother's son, would have succeeded to her but that Jamuna was disqualified from succession as he was the son of a murderer. It has relied upon the decision of the Privy Council in *Kenchava Kom Sanyellappa Hosmani v Girimalappa Channappa Samasagar* (1) which lays down that a murderer and anyone claiming through him, is excluded from succeeding to the estate of the victim. The Privy Council based this rule on the principles of

(1) AIR 1924 PC 209

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equity, justice and good conscience In our opinion, this rule is not applicable to the present case. In the first place, succession in the present case, is not to the estate of Budha, the victim of the murder, but to the estate of Smt Kamla The rule cannot apply to succession to the estate of Smt Kamla In the second place, succession is governed by the statutory provisions contained in the U P Zamindari Abolition and Land Reforms Act and the law of succession laid down therein cannot be altered or changed by any rule or principles not contained in the Statute itself When the Legislature laid down a particular line of succession and did not provide for the exclusion of any one in that line on any ground, then it is not permissible to engraft exceptions or exclusions on the ground of equity, justice or good conscience Rules of equity, justice and good conscience are applicable when the matter is not governed by statutory provisions The Board has observed that the principles of Hindu Law as enunciated in ss 25 and 27 of the Hindu Succession Act, 1956 apply to succession under the U P Zamindari Abolition and Land Reforms Act This is not correct The provisions of ss 25 and 27 apply only to succession under Hindu Succession Act and not to succession under other enactments Further, the Hindu Succession Act which was enacted in 1956, was not even in existence in 1954 when succession in the present case opened

The Board committed another manifest error of law when it said that the property of Smt Kamla would devolve on Smt Bhagwati as Jamuna was disqualified Even in the absence of Jamuna, Smt Bhagwati could not succeed to the property of Smt Kamla Smt Bhagwati is the widow of Smt Kamla's brother and under no provision of the U P Zamindari Abolition and Land Reforms Act is she an heir of Smt, Kamla,

The appeal is accordingly allowed the judgment of the learned single Judge is modified and the judgment of the Board allowing the second appeals is quashed. The Board will, after giving the parties a fresh opportunity of being heard, decide the second appeals in accordance with law and in the light of the observations made in this judgment. The parties will bear their own costs of this appeal.

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*Ordered accordingly*

## APPELLATE CIVIL

*Before Mr Justice Jagmohan Lal\**

RAMESH CHANDRA AND OTHERS

APPELLANTS,

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*April, 24*

*v.*

TULSI RAM AND OTHERS

RESPONDENTS

**Transfer of Property Act, 1882, s 60 and Code of Civil Procedure, 1908, O 1, r 9 and O XXXIV, r 1—Right of co-mortgagor to redeem mortgaged property—Suit for redemption—Non-impleading of co-mortgagors, when not fatal to the suit**

The provisions of O XXXIV, r 1, C P C are subject to the provisions contained in O 1, r 9

Where, the integrity of the mortgage having broken, a co-mortgagor wants to redeem his own share, it is necessary for him to implead the other co-mortgagors also because in their absence his share cannot be determined and without the determination of his share he cannot be permitted to redeem the entire mortgage. In such a case he is entitled to redeem only to the extent of his own share. So the defect of non-joinder of his co-mortgagors in the suit, either as co-plaintiffs or as *pro forma* defendants, may be fatal resulting in the dismissal of his suit. But where the integrity of the mortgage is intact and one of the co-mortgagors wants to redeem the entire mortgaged property, the other co-mortgagors should be impleaded as proper parties, but their non-impleadment is not

\*While sitting at Lucknow

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fatal to the suit. All the controversial matters between the mortgagee and the mortgagor can be effectively decided between the parties who are before the Court within the meaning of O I, 19 of the Code of Civil Procedure. In such a case the defect of non-joinder of other co-mortgagors will not be fatal.

*Muhammad Yunus v Champamani Bibi* (1) relied on  
*Ishamud Husain v Muhammad Qasim Khan* (2) *Ghura Koer v Bishun Ram* (3) referred to

Second Appeal No 33 of 1964 against the judgment and decree dated 18th October, 1963 passed by I. P. Mital, Civil Judge, Kheri

*N Banerji, for the Appellants*

*D K. Trivedi, for the Respondents*

JAGMOHAN LAL, J — This appeal arises out of a suit for redemption of a usufructuary mortgage deed dated 14th June, 1907 filed by the plaintiff-respondents nos 1 and 2. This mortgage was executed by Salik Ram and Chotey Lal in favour of Mahadeo Prasad and others. The defendant-appellants as well as the defendant-respondents nos 3 to 5 are the successors of the original mortgagees. The plaintiff-respondents are admittedly the successors of Salik Ram, one of the two mortgagors. They claimed themselves to be the successors of the other co-mortgagor Chotey Lal also, though this fact was disputed by the defendants.

The trial court held that the plaintiffs were the successors of Chotey Lal also and as such they were entitled to maintain this suit for redemption of the entire mortgaged property.

The lower appellate court without reversing this finding of fact of the trial court side-tracked this issue as it was of the opinion that even if the plaintiffs are held to be successors of Salik Ram alone, they were entitled to maintain the suit for redemption of the entire

(1) AIR 1989 Pat 49

(2) AIR 1929 All 814

(3) AIR 1926 All 46

mortgaged property and the non-impleadment of the legal heirs, if any, of Chotey Lal would not be fatal to the suit as the controversy involved in the suit could be effectively decided as between the parties to the suit

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TULSI RAM  
Jagmohan  
Lal, J

This view of the lower appellate court is assailed in this second appeal by the learned counsel for the appellants. The findings recorded by the courts below on some other controversial points were also challenged, but the learned counsel for the appellants did not press those points, and rightly, because those matters are concluded by findings of fact.

I have, therefore, to see whether in this case the non-impleadment of the legal heirs of Chotey Lal mortgagor, assuming that there were any such heirs at the time of the suit, is a defect which should result in the dismissal of the suit. The learned counsel for the appellants relies on the provisions contained in O. XXXIV, r 1 of the Code of Civil Procedure which provides that subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. This provision is subject to the provision contained in O 1, r 9 of the Code of Civil Procedure which lays down that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. S 60 of the Transfer of Property Act confers a right of redemption on every mortgagor subject to the condition that if he has only a share in the mortgaged property he will not be entitled to redeem his share only on payment of a proportionate part of the mortgage money except where the integrity of the mortgage has

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been broken on account of the mortgagee having acquired in whole or in part the interest of a mortgagor. From this it follows that if the integrity of the mortgage has been broken, the other co-mortgagor can redeem his own share by payment of the proportionate amount of the mortgage money but otherwise he has to redeem the mortgage as a whole or not to redeem at all. Where, the integrity of the mortgage having broken, a co-mortgagor wants to redeem his own share it is necessary for him to implead the other co-mortgagors also because in their absence his share cannot be determined and without the determination of his share he cannot be permitted to redeem the entire mortgage. In such a case he is entitled to redeem only to the extent of his own share. So the defect of non-joinder of his co-mortgagors in the suit, either as co-plaintiffs or as *pro forma* defendants may be fatal resulting in the dismissal of his suit. But where the integrity of the mortgage is intact and one of the co-mortgagors wants to redeem the entire mortgaged property, the other co-mortgagors should be impleaded as proper parties, but their non-impleadment is not fatal to the suit. All the controversial matters between the mortgagee and the mortgagor can be effectively decided between the parties who are before the court within the meaning of O 1, r 9 of the Code of Civil Procedure. In such a case the defect of non-joinder of other co-mortgagors will not be fatal. The same view was taken by a Bench of Patna High Court in *Muhammad Yunus v. Champamam Bibi* (1). It was held in this case that whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy.

(1) AIR 1969 Pat. 49



so far as regards the rights and interests of the parties actually before it

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Lal, J

The learned counsel for the appellants relied on a decision of this Court in *Ahmad Husain v Muhammad Qasim Khan* (1). In that case the integrity of the mortgage had been broken and thereafter one of the co-mortgagors brought a suit for redemption in which the other co-mortgagors were also impleaded as *pro forma* defendants besides the mortgagee who had acquired ownership in part of the mortgaged property giving rise to the breaking of the integrity of the mortgage. The plaintiff wanted to redeem the entire share in the mortgaged property except that which had been acquired by the mortgagee. It was held that he was not entitled to redeem more than his own share. It was pointed out on his behalf that since in the suit he had impleaded his other co-mortgagors also as *pro forma* defendants he ought to have been allowed to redeem their share also along with his own share. This contention was not accepted. It was observed that so far as the impleadment of other co-mortgagors is concerned it was necessary for the proper framing of the suit, but that fact by itself would not give him a right to redeem more than his own share. Another decision of this Court in *Ghura Koer v Bishun Ram* (2) was also referred by the learned counsel for the appellant. That too has no relevancy for the point which is directly in issue before us. In that case also after the integrity of the mortgage had been broken, one of the mortgagors filed a suit for redemption arraving both the mortgagee and his co-mortgagors as defendants. In that suit account was taken and the liability to pay the mortgage money, in respect of the properties which were still left with the mortgagors, was determined. The amount was not paid. Subsequently, another co-

(1) A I R, 1926 All. 46.

(2) A I R 1929 All 814.

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mortgagor brought a suit for redemption and he wanted that the accounting should be done again to determine the amount due by the property left with the mortgagors. It was not done by the courts below on the ground that the previous decision in which this amount had been determined operated as *res judicata* on that point. When the matter was brought before this Court, it was contended on behalf of the plaintiff that in the former suit though the plaintiff was impleaded as *pro forma* respondent he was not a necessary party and as such the determination of the amount between the mortgagee and co-mortgagor, who had brought the previous suit, would not be binding on him. That contention was not accepted on the ground that he was a necessary party in that previous suit in view of the provisions contained in O XXXIV, r 1 of the Code of Civil Procedure. As observed above, after the integrity of the mortgage has been broken a co-mortgagor who wants to redeem his own share, and he is not entitled to redeem more than his own share, has to implead the other co-mortgagors also so that the extent of his share in the mortgaged property and his proportionate liability in the mortgage money may be determined. This is not the case in the present suit where the plaintiffs wanted to redeem the entire mortgage of which the integrity was intact. I am, therefore, of the opinion that the view taken by the lower appellate court on this point is correct and this appeal is without any merits.

The appeal is dismissed with costs to the contesting respondents.

*Appeal dismissed*

## APPELLATE CIVIL

Before Mr Justice Jagmohan Lal and Mr Justice  
Onkar Singh\*

STATE OF U P AND ANOTHER

APPELLANTS,

v.

KRISHNA CHANDRA GUPTA

AND OTHERS

RESPONDENTS

1978

May, 2

U. P. Municipalities Act, 1916, ss 10-A and 30—*Municipal Board—Supersession of, during its extended term.*

There is nothing in the language of s 30 of the Act which debars the Government from taking action against a Board after its terms has been extended under the proviso to s. 10-A (1)

—Term extended during the pendency of proceedings under section 30—Delay in passing final orders—inference from.

Under the circumstances of the present case if no final orders under section 30 could be passed for about 4 months it cannot be inferred merely from this delay, in the absence at any time limit prescribed by law for disposal of such cases like the time limit fixed by s 180(3) of the Act, that the proceedings had been dropped and the default, if any, of the Board had been condoned by the Government.

—S 30—Word and Phrases—Expression “wilful default”—Meaning of

In context of s 30 of the Act the expression “wilful default” means a failure to perform duty arising out of the Board’s lack of willingness or its disinclination to perform that duty and such failure should not be the result simply of any accident, inadvertance, carelessness or negligence

*Ram Chandra Nartasimha Kulkarni v State of Mysore* (1), relied on

*Om Prakash Gupta v State of U. P.* (2), *Shagilal M. Davay v S R Subramania Iyer* (3), *Radhey Mohan v. Har Narain Das* (4), referred to

Constitution of India, Art 226—*And Municipalities Act, 1916, s 30—Reasons for supersession given in order—Reasons must be germane to and not extraneous or irrelevant to the charges—High Court will not look into the sufficiency of reasons*

\* While sitting at Lucknow

(2) A I R, 1957 S.C. 458

(3) A I R 1954 Mad. 514

(4) A.I.R 1952 All 504

(1) A I R 1964 S C. 1701.

(3) A I R 1954 Mad. 514

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The reasons stated in the supersession order must be germane to the controversy involved in the charge and should not be extraneous or irrelevant to that controversy. If the reasons are wholly irrelevant and not germane to the controversy in the sense that they do not show the inadequacy or unsatisfactoriness of the explanation submitted by the Board and lead to an inference about the correctness of the charge, they shall not be deemed to be the reasons contemplated by this section. Once the reasons have been so stated by the Government for passing the order of supersession, this Court will not look into the sufficiency or otherwise of those reasons and will not substitute its own judgment for the judgment of the Government for taking the action.

*I P. Kapoor v State of U. P.* (1), *Suresh v. State* (2), relied on

Special Appeal no 44 of 1972 against the judgment and order dated November 21, 1972 passed by O. P. TRIVEDI, J. in W. P. no. 948 of 1972.

*A. S. Verma*, for Appellants.

*H. D. Srivastava*, for Respondents.

JAGMOHAN LAL, J.:—This special appeal filed on behalf of the State of U. P. and the District Magistrate, Sitapur as Administrator, Municipal Board, Sitapur, is directed against a decision of a learned single Judge of this Court under which he allowed Writ Petition no. 948 of 1972. That writ petition had been filed by Krishna Chandra Gupta respondent no. 1 as President of the erstwhile Municipal Board, Sitapur against the State of U. P., the District Magistrate, Sitapur, Sri Uma Shanker Dixit, the then Union Minister for Health, Government of India, New Delhi, Sri Dharam Datt Vaidya, Minister for Medical and Public Health, U. P. Government and Sri Abid Ali, Deputy Minister for Transport, U. P. The Municipal Board, Sitapur was also impleaded as a *pro forma* party to this writ petition.

The allegations made by the petitioner in his writ petition so far as relevant for the decision of this special

(1) 1967 A.L.J. 1048.

(2) A.L.R. 1970 M. P. 164.

appeal were in brief that the Municipal Board, Sitapur after the General Elections held in June 1967 was constituted in June 1967 for a term of five years as provided in s 10-A of the U P Municipalities Act, (to be hereinafter referred to as the Act) and that term was to last up to 11th June, 1972. The petitioner was elected as President of this Board after the previous President had been removed on account of a no-confidence motion passed against him on 27th August, 1968. After assuming charge as President the petitioner tried his best to improve the affairs of the Board but his efforts in that direction were not liked by those members of the Board whose self-interests were adversely affected by the petitioner's efforts to bring about improvements. Some of the members turned hostile to the petitioner. He submitted a report to the Commissioner through the District Magistrate, Sitapur for the removal of six members of this Board who were obstructing him in his efforts to improve the affairs of the Board for their selfish ends. But the Government did not take any action on that report. In the meantime, these members with the help of some other members were successful in bringing a motion of no-confidence against him which was fixed for consideration on 25th May, 1970. In the meantime, a criminal complaint had been filed against the petitioner under s 465 of the Indian Penal Code by the some interested person and during the pendency of that complaint the petitioner was suspended from his office of President of the Board under s. 48(3) of the Act. On account of this suspension he could not participate in the meeting held on 25th May, 1970 for consideration of the no-confidence motion against him. That motion was passed on that date.

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The petitioner then filed the Writ Petitions Nos. 675 of 1970 and 676 of 1970 in this Court challenging the order of his suspension and the resolution of no-confidence passed against him in the meeting held on 25th May 1970. Both these writ petitions were allowed by a learned single Judge of this Court on 13th April 1971 against which special appeals are pending. The petitioner contended that he belonged to that faction of the Congress Party which is known as Congress (O) while the Government of this State was headed by the other faction of the Congress known as Congress (R). In order to put pressure on the petitioner to join Congress (R) party a notice dated 14th February, 1972 containing some charges against the Board was sent by the Government and the Board was required to explain as to why it should not be superseded under s. 30. An explanation dated 2nd March, 1972 on behalf of the Board was submitted by the petitioner and thereafter nothing happened. On 7th June, 1972 the existing term of the Board which was to expire on 11th June 1972 was extended for another year. The petitioner further alleged that on 11th June, 1972 Sri Uma Shanker Dixit, the then Union Minister for Health who was arraved as opposite-party no. 3 in the writ petition, accompanied by Sri Dharam Datt Vaidya, the then Minister for Local Self-Government, U P (opposite-party no. 4) and Sri Abid Ali, Deputy Minister for Transport U P Government (opposite-party no. 5) visited Sitapur and a civic address was presented to him on behalf of the Municipal Board Sitapur which was followed by a tea party given in his honour by the Board. In the course of conversation these Ministers wanted the petitioner to make a public announcement that he had left Congress (O) and joined Congress (R) to which he did not agree and thereby incurred their displeasure. According to him this displeasure was

shown by superseding this Municipal Board by the Government through a notification dated 19th June, 1972 published in the *U P Gazette*, dated 21st June, 1972 under which the Board was superseded for a period of two years

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This order of supersession was challenged by the petitioner in that writ petition on the ground that it was *mala fide* and illegal. One of the grounds on which the validity of this order was challenged was that action under s 30 of the Act could be taken by Government only during the original term of five years of the Board and not during its extended term as extended under the proviso to sub-s (1) of s 10-A. This ground as well as the ground of the order being *mala fide* were not accepted by the learned single Judge. The other grounds on which the validity of this order was challenged and which found favour with the learned single Judge were that the term of the Board having been extended by the Government on 7th June, 1972, the proceedings under s 30 of the Act which were pending before the Government, shall be deemed to have been dropped and the wilful default, if any, of the Board shall be deemed to have been condoned, that the order of supersession does not record reasons as required by s 30, that the order of supersession was bad as the Government did not consider the question that it was only wilful default which could justify supersession and there was no finding of wilful default, and that a scrutiny of the charges and the so-called reasoning of the Government could not lead to the conclusion that there was any wilful default on the part of the Board either alleged or proved. On these grounds the writ petition was allowed and the order of supersession Ann. 7 to the writ petition was

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quashed. It is against that decision that the present special appeal is directed.

We heard the learned counsel for the parties. The learned counsel for the contesting respondent no. 1, besides supporting the judgment of the learned single Judge on the points on which findings were recorded in his favour, also questioned the correctness of the findings on the point decided against him. In this way the entire controversy which was raised before the learned single Judge has been raised again in this special appeal. We shall consider these points serially.

As regards *malu fide*, besides the vague allegations contained in the writ petition that attempts were made to persuade the petitioner to join Congress (R) party to which he did not agree, which did not even indicate as to who made those attempts and on what occasion, the only specific incident that was alleged was in respect of a civic reception held at Sitapur on 11th June 1972 in which an address was presented on behalf of this Board to Sri Uma Shanker Dixit, the then Union Minister for Health. On that occasion he as well as Sri Dharma Datt Vaidya (opposite-party no. 4), the then Minister for Local Self-Government, U P and Sri Abid Ali (opposite-party no. 5), the then Deputy Minister for Transport, U P were alleged to have pressed the petitioner to make a public announcement about his intention to leave Congress (O) and join Congress (R) to which the petitioner did not agree. Each of these three opposite-parties filed his counter-affidavit refuting these allegations. We agree with the learned single Judge that there is no good reason to disbelieve their counter-affidavits and accept the affidavit of the petitioner on this point. The learned counsel for the contesting respondent no. 1 pointed



out that Sri Uma Shanker Dixit did not categorically deny that there was any talk about the petitioner joining Congress (R) party and so it may be inferred that there was at least some talk on this topic. The relevant part of the counter-affidavit of Sri Uma Shanker Dixit is as follows

"It is denied that the deponent exercised pressure on the petitioner to join Congress (R) party and as such there was no occasion to make any announcement to that effect in the meeting. To the best of my memory and recollection there was no talk about the petitioner joining Congress (R) party. The allegations made that the reply given by the petitioner was not relished by the deponent is baseless in view of the facts stated above."

We are unable to draw any such inference from this affidavit as suggested by the learned counsel for the respondent no. 1. There is a clear and categorical denial so far as the petitioner's allegation goes that Sri Uma Shanker Dixit had pressed him to make a public announcement about his joining Congress (R) and also of the fact that when he did not agree to it, it was not relished by him. When two persons who till lately belonged to the same political party meet on an official function arranged by one of them in the honour of the other, it is natural that there is some conversation between them. If on such occasion any person makes a casual remark that the split in the Congress Party was unfortunate, nobody would care to remember such an innocent and casual remark for more than two months. It is perhaps to rule out such a situation that Sri Uma Shanker Dixit deposed that to the best of his memory and recollection there was no talk about the petitioner joining Congress (R) party. It cannot certainly mean that any pressure was exercised on the

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petitioner by Sri Uma Shanker Dixit which fact is clearly denied on oath by him.

Sri Dharam Datt Vaidya in his counter-affidavit also denied that some members of the Municipal Board, Sitapur belonging to Congress (R) party exercised pressure on him and managed to get a notice dated 14th February, 1972 issued against the Board. He further deposed that the affairs of this Board were not being managed properly and even the Commissioner, Lucknow Division vide his letter dated 8th April, 1970 had recommended to the State Government that the Board be superseded. He further deposed that supersession order under s 30 of the Act was passed by the State Government after fully considering the reply sent on behalf of the Board to the charges mentioned in the charge-sheet. It has also not been indicated by the petitioner what difference his joining the Congress (R) party would have made on the fate of this party in June, 1972 after it had already received a mandate from the people in the mid-term elections held in 1971. We, therefore see no good reason to differ from the learned single Judge that the plea of *mala fide* has not been established by the petitioner.

The plea raised on behalf of the contesting respondent no 1 that action under s 30 of the Act could be taken by the Government only during the original term of the Board and not during its extended term as extended under the proviso to sub-s (1) of s 10-A, is also untenable. We agree with the learned single Judge that there is nothing in the language of s 30 which debars the Government from taking action against a Board after its term has been extended under the proviso to s 10-A (1). Sub-s (1) of s 10-A reads as follows:

"Except as provided in s 31 or 31-A, the term of every Board shall be five years

Provided that the State Government may, by notification in the official *Gazette*, extend from time to time the term of all or any of the Boards, so, however, that the total extension in the case of any Board does not in the aggregate exceed two years."

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The opening words of this section 'except as provided in s 31 or 31-A' are in the nature of an exclusion clause which governs the entire sub-s (1) including its proviso. Once a Board is superseded under s 30, the period of supersession and the reconstitution of the fresh Board will be governed by s 31, and sub-s (1) of s 10-A will have no application to its original term nor the proviso to this sub-section will come into play for extending the term of the Board, if the supersession is to last beyond the original term or the extended term of the Board. If the supersession is intended to last beyond the date on which the original term or the extended term of the Board under s 10-A (1) is to expire, the period of supersession, if it is not originally sufficient to cover that period, can be extended by the State Government from time to time by a notification under the Explanation to s 30. Cl (c) of s 31 provides that a fresh Board shall be constituted with effect from the date of expiry of the period of supersession as though the term fixed under s 10-A had expired. From a combined reading of these provisions it is evident that it was permissible for the State Government to supersede this Board under the notification dated 19th June, 1972 for a period of two years even though the term of this Board as extended under a notification dated 7th June, 1972 was to last only till 11th June,

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1973. The Government has to reconstitute a Board under s. 31 (c) with effect from the date of the expiry of the period of supersession unless this period is further extended under Explanation to s. 30. For that purpose it is not necessary to have recourse to the proviso to sub-s (1) of s. 10-A. We therefore agree with the learned single Judge that the order of supersession does not suffer from any infirmity on this score.

The next point that has to be considered by us is whether the extension of the term of this Board for a further period of one year under a notification dated 7th June, 1972 (Ann. 4 to the writ petition) has the effect of dropping the proceedings under s. 30 which were pending against the Board on that date as held by the learned single Judge. It may be stated that the existing term of this Board as well as several other Boards was due to expire on 11th June, 1972. It was not possible for the Government to hold general elections and reconstitute these Boards between 7th June, 1972 and 11th June, 1972. So if the term of these Boards had not been extended under the proviso to s. 10-A a vacuum would have been created and there would have been no authority to function as Board after 11th June, 1972. So under this notification (Ann. 4 to the Writ Petition) the term of this Board as well as the other Boards which was due to expire on 11th June, 1972 was further extended up to 11th June, 1973 or till the reconstitution of new Board after general elections whichever event took place earlier. For this extension made in exercise of powers under the proviso to sub-s (1) of s. 10-A, the circumstance that on that date the proceedings under s. 30 for the supersession of this Board were pending consideration, was wholly irrelevant. Similarly, this extension of the term by itself is altogether irrelevant for considering the explanation submitted by the Board in reply to

the charges served on it and thereafter passing an order of supersession, if the Government thought fit to do so. It is not suggested that before 7th June, 1972 the Government had considered the explanation submitted on behalf of this Board and taken a decision not to supersede it but allow it to function as usual. Had it done so, the natural course for the petitioner would have been to request the Court to summon the file in which this decision had been taken and if thereafter the Government had produced that file by claiming privilege, the position would have been different. In this case neither the petitioner suggested nor the learned single Judge found that these charges had been considered and some decision had been taken by the Government prior to 7th June, 1972. What the learned single Judge thinks is that there was enough time for the Government after receipt of the Board's explanation dated 2nd March, 1972 to consider it and take a decision on it till 7th June, 1972 and if it did not do so and chose to extend the term of the Board on 7th June, 1972, it shall be presumed that the proceedings under s. 30 had been dropped. The relevant portion of the judgment of the learned single Judge in which he considered this matter reads as follows:

" . . . The contention raised in the counter-affidavit is that the State Government was left with no other alternative except to grant extension because the general elections could not be held by 11th June, 1972 when the Board's term was going to expire. The argument of the learned Chief Standing Counsel was that in case the term of the Board had expired on 11th June, 1972 without the election being held then the State Government would have been left without an administrative

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machinery to carry on the functions of the Municipal Board. It was pointed out that a person to look after the functions of the Board can be appointed by the State Government under s 31 on supersession of the Board and under s 31-A on dissolution of the Board and that there was no provision for appointment of an Administrator to carry on the functions of the Board when its term had expired without general elections being held. This argument fails to impress because instead of granting an extension under s 10-A the State Government could have taken action on the charges served upon the petitioner and superseded the Board instead of granting an extension. After supersession an Administrator could be appointed under s 31 and the elections held during the period of supersession. It cannot therefore, be said that extension of the Board's term was the only expedient open to the State Government. Besides, if the holding of general elections was indeed the motivation for extension then one would have expected some concrete step to be taken towards the elections. Not even the date for holding the elections was fixed by the State Government under s 13-A of the Act before expiry of the Board's term and indeed neither before the date of extension nor afterwards till today any step were said to have been taken towards holding the elections. The explanation offered for the State Government for granting extension instead of taking decision on the charges is far from being convincing. From the grant of extension in the background of the above facts, therefore, it is to my mind a fair and inescapable inference that the charges contained in the notice dated 14th February, 1972 were dropped, withdrawn or waived at the time when ex-

tension of term was granted to the petitioner on 7th June, 1972 and it is equally inevitable to infer that the subsequent order of supersession passed on those very charges was the result of second thoughts "

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We are unable to agree with these observations of the learned single Judge which are more in the nature of an advice to the Government for expeditious disposal of such cases under s 30 than the reasons based on any legal principles. Of course, despatch and expedition in disposal of cases is desirable not only at Government level but in all other offices of the Government. But it is a matter of common experience that there are delays in disposal of the cases in all offices. So far as the present case is concerned it is a matter of common knowledge that the file has to pass through several hands, and each office takes its own time to record its note or opinion, before final action can be taken by the Government under s 30. The very explanation dated 2nd March, 1972 submitted on behalf of the Board was required under Ann 2 to be submitted through the District Magistrate, Sitapur along with his comments. If in the circumstances no final order under s 30 could be passed on it for about four months it cannot be inferred merely from this delay, in the absence of any time limit prescribed by law for disposal of such cases like the time limit fixed by s 180(3) of the Act, that the proceedings had been dropped and the default, if any, of the Board had been condoned by the Government. So there is no legal warrant for the proposition that after 7th June, 1972 a fresh notice should have been served on the Board mentioning fresh defaults, if any, on the part of the Board.

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The next question that arises for our consideration is whether the State Government after taking into consideration the explanation of the Board to the charges served on it not only felt satisfied that the Board had made a wilful default in the performance of any duty imposed upon it by or under the Act but the reasons for that satisfaction had also been stated in the order published in the official Gazette as is required by s 30. The reasons so stated in the order must be germane to the controversy involved in the charge and should not be extraneous or irrelevant to that controversy. If the reasons are wholly irrelevant and not germane to the controversy in the sense that they do not show the inadequacy or unsatisfactoriness of the explanation submitted by the Board and lead to an inference about the correctness of the charge, they shall not be deemed to be the reasons contemplated by this section. Once the reasons have been so stated by the Government for passing the order of supersession this Court will not look into the sufficiency or otherwise of those reasons and will not substitute its own judgment for the judgment of the Government for taking the action. In this connection reference was made by the learned counsel for the respondent no 1 to a single Judge decision of this Court in *I P Kapoor v. State of U P* (1). The learned Judge observed at p 1046 of the reports:

"It is apparent that the requirement that reasons for the order shall be published in the official Gazette is to provide a safeguard against arbitrary action on the one hand and to convince the citizen and the members of the Board, of the ground on which the State Government reached the requisite satisfaction to deprive them of their right

(1) 1967 A.L.J. 1043.



to local self-government. The purpose of the requirement that reasons shall be stated is to ensure that the reasons which have impelled the action are germane and relevant to the content and scope of the power vested in the State Government."

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The decision of a Division Bench of Madhya Pradesh High Court in *Suresh v State* (1) was also referred to, in which s 422 of the Madhya Pradesh Municipal Corporation Act, 1956, which is analogous to s 30 of the U P Municipalities Act, came for interpretation. It was observed in this case at pp 160-161 of the report.

"In this context, the further requirement that the reasons for making the order shall be stated, must be understood to mean that reason for rejection of the explanation of the Corporation must also be stated. The statutory requirement of stating the reasons is not satisfied simply by narrating the charges and the opinion of the Government that the explanation of the Corporation has failed to meet the charges, in our view it is also necessary that reasons for that opinion should be stated."

With respects, we agree with these observations so far as they lay down the general principles in judging these matters. We have, however, to see whether in the present case these requirements have been factually fulfilled or not.

Before we examine the various charges, the explanation of the Board to those charges and the findings recorded by the State Government, we may state a few words regarding the interpretation of the expression 'wilful' used in s 30. This word has not been defined

(1) AIR 1970 M P 154.

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in the Act or in any other enactment though it has been repeatedly used in several Acts and it came for interpretation before the Courts on various occasions. On behalf of the respondent reference was made to the decisions in *Om Prakash Gupta v State of U P* (1), *Ramu Chandra Narasimha Kulkarni v State of Mysore* (2), *Shugilal M. Divay v S R Subramania Iyer* (3) and *Rudhey Mohan v Hari Narain Das* (4). These decisions have been noticed by the learned single Judge in his judgment who after an examination of those cases concluded that the phrase 'has made wilful default' used in s. 30 of the Act means and implies that the default of the Municipal Board concerned in the performance of its duty must be the result of deliberation or for some purpose or the consequence of a reckless omission but not the result of inadvertence, carelessness or negligence. The Supreme Court in *Ramu Chandra Narasimha Kulkarni v State of Mysore* (2) held that the meaning to be attached to the words 'wilful' and 'wilfully' has to be ascertained on a close examination of the scheme and nature of the legislation in which the words appear and the context in which they are used. We agree with the learned single Judge that in the context of s. 30 of the Act the expression 'wilful default' means a failure to perform duty arising out of the Board's lack of willingness or its disinclination to perform that duty and such failure should not be the result simply of any accident, inadvertence, carelessness or negligence. It is from that point of view that the charges which the State Government held to be proved against the Board have to be examined.

The learned single Judge is of the opinion that so far as sub-heads (2), (3) and (6) of Charge no 3 are concerned, neither the charge-sheet stated that these

(1) A I R 1957 S C 458  
(3) A I R 1954 Madras 514

(2) A I R 1964 S C 1701  
(4) A I R 1952 All 504

defaults of the Board were wilful nor the order passed by the Government has given any reasons to support its view that the alleged failures were the result of wilful default. In our opinion, this position is not factually correct. The charge sheet is in Hindi. Charge no 3, after excluding those portions of it which have been proved, may be translated thus

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*Charge no 3*—The Municipal Board has granted temporary leases of land to some persons for making pucca constructions thereon in contravention of the rules. Some instances of them are given below:

(1) . . . . .

(2) The Municipal Board granted a temporary lease of roadside pavement land near old water tank on Babar Road to Sri Mukhtar Ahmad who has made pucca construction on it. The Municipal Board has not taken any steps to prevent the work of this pucca construction on this land.

(3) The Municipal Board granted temporary leases of land on roadside pavement on City Post Office Road to Sarvsri . . . . . and Balak Ram. Sri Balak Ram has with the help of some members of the Municipal Board constructed some pillars on the land given to him.

(4) . . . . .

(5) . . . . .

(6) In Mohalla Jogi Tola, Sri Karim Bux was not prevented from making pucca constructions on roadside pavement.

(7) . . . . .

(8) . . . . .

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Granting of lease of roadside pavement land is against the Government Order no. 857/11-B—210-I. T -49, dated 4th March, 1953. ....

. . . In this way, the Municipal Board has made wilful default in performance of its duty under s 7(1)(g) of the U P. Municipalities Act which enjoins on it the duty for protecting, maintaining and developing the property vested in, or entrusted to the management of the Board."

From the above it would be evident that after mentioning eight instances of the failure of the Board to protect the property vested in, or entrusted to the management of the Board, it was charged of having made wilful default in performance of its duty enjoined on it by s 7(1)(g). In relation to Charge no. 5 this order was reversed. In the beginning the Board was charged of wilful default in making proper arrangement for the cleanliness of the city which was one of its statutory duties and thereafter some instances of that failure were stated. But in Charge no 6 again, first, the instances of the failure of the Board to perform its duty about the lighting of the streets had been stated and thereafter it was charged with wilful default in performing its duty. These are the only charges which have been held to be established against the Board. So, it cannot be said that in the charge-sheet the Board was not charged with wilful default in relation to sub-heads (2), (3) and (6) of Charge no. 3.

So far as the order of supersession (Ann 7) is concerned, the State Government has dealt with each item of the charge separately. After reproducing the charge and summarising the explanation submitted by the Board with respect to that charge, the Government stated its reasons for not accepting the explanation and

arriving at its own conclusion. In each of these conclusions also, it has been stated that the default of the Board to perform its duty was wilful.

The only point that now remains to be considered is whether the reasons stated by the State Government in its order which was published in the Gazette, are germane to the controversy involved in the particular charge or they are extraneous and irrelevant to that controversy so as to be no reasons within the meaning of s 30.

In reply to the specific instances mentioned in sub-head (2) of Charge no 3 relating to the Board's wilful default in performance of its duty to protect the property entrusted to its management, the explanation of the Board was that it appeared that Sri Mukhtar Ahmad constructed his pucca house and in doing so he encroached upon the roadside pavement land and in this connection the former Board gave a notice under s 186 of the Act to remove the encroachment from this land but he did not remove it. It was further stated that the Board proposed to start proceedings against him under Public Land Eviction Act.

The Government did not find this explanation satisfactory as the present Board had not till then started the necessary proceedings for the removal of those encroachments and thereby made a wilful default in performance of its duty. It is clear from the explanation of the Board that it was aware of this encroachment made by Sri Mukhtar Ahmad on roadside pavement land and also of the fact that the previous Board had given him a notice under s 186 of the Act to remove those encroachments. Still it did not take any follow up action for almost its full term of five years and only when this charge was levelled against it, that it proposed to take some action under the Public Land Eviction

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Act. The Board had power to get the encroachment removed by demolition of the portion of the building under s 307(b) of the Act. It is doubtful if the alleged Public Land Eviction Act (of which no specific reference has been mentioned in the explanation) could at all be used for that purpose. In these circumstances, if the Government did not accept the explanation of the Board and found it guilty of wilful default, it cannot be said that the Government acted arbitrarily and did not state the reasons as contemplated by s. 30.

The next instance cited under sub-head (3) of Charge no. 3 in so far as it related to Balak Ram was that the Board gave on temporary lease some roadside pavement land near City Post Office to him and he had with the help of some members of the Board illegally constructed some pucca pillars on this land.

The explanation of the Board was that the former Board had through its resolution dated 31st March, 1966 given the said land on lease to Balak Ram but the execution or further execution of that resolution was prohibited by the District Magistrate, Sitapur under s 34 of the Act by his order dated 11th April, 1966. In spite of that order Balak Ram made constructions on this land. So the present Board proposed to take action against him under Public Land Eviction Act for the removal of those constructions made by him illegally in spite of the prohibitory order of the District Magistrate under s 34.

The Government did not find this explanation satisfactory because in spite of the prohibitory order of the District Magistrate under s 34 dated 11th April, 1966 (of which this Board was fully aware) no action had been taken by the present Board (for almost five years) to get the encroachments removed. The Government thought that the Board did not deliberately take action

and made wilful default in the performance of its duty In our opinion, no valid exception can be taken if the Government in these circumstances did not accept the explanation of the Board and held this charge as proved.

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The learned single Judge appears to have made out a new case in this matter. He thinks that the resolution giving the land on lease to Balak Ram had been passed by the former Board on 31st March, 1966 and the order under s 34 was passed by the District Magistrate on 11th April, 1966 So, that order was infructuous No such plea had been taken by the Board in its explanation. A resolution passed by the Board for certain land to be given to a person on lease has to be followed by the execution of a registered lease in his favour. There is nothing on record to show that such lease deed had also been executed in favour of Balak Ram before 11th April, 1966 In any case, the scope of s 34 is very wide and an order passed under it could not only prohibit the execution of a lease deed in pursuance of the resolution dated 31st March, 1966 in favour of Balak Ram, but also prohibit him from making any construction on the land on the basis of that lease The Board itself admitted in its explanation that the construction made by Balak Ram in spite of District Magistrate's order under s 34 was illegal but offered no explanation for its reckless omission to take any action against him for five years If on these facts the Government held this charge to be

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proved, we see no justification to substitute our own judgment for that of the Government by invoking new grounds in defence of the Board as done by the learned single Judge, which the Board itself had not pleaded in its explanation

The instance mentioned under sub-head (6) of Charge no 3 related to the making of some pucca construction by one Karim Bux on roadside pavement land in mohalla Jogi Tola. The Board's explanation was that according to the advice given by its Standing Counsel this construction did not constitute an encroachment on roadside land and so no legal action was taken against him. The Government did not meet this explanation but stated that since the District Magistrate had passed an order under s 34 in respect of this land and in spite of that order Karim Bux made the construction on it and the Board did not take any action against him, it wilfully made a default in the performance of its duty. The alleged order of the District Magistrate under s 34 relating to this land or the circumstances in which this order was passed were not stated in the charge and the Board had no opportunity to offer its explanation on that point. So, in respect of this charge the reasons given by the Government cannot be said to be germane to the controversy involved in the charge.

Charge no 5 related to the Board's wilful failure to perform its duties enjoined by s 7(1)(c) and (h) by way of cleaning public streets, removing noxious vegetation and abating of public nuisance and construct-



ing drains Among other things, it was specifically stated that the Board had failed to make proper arrangement for the collection of human excreta in the city and burning the same and sometimes the faecal matter and urine were collected in inhabited localities which could spread infectious diseases Further it was mentioned that in mohalla Laxmi Nagar no drains were constructed and water used to flow and accumulate on the streets The Board tried to shift the blame on its Medical Officer of Health for whose transfer a request was made to the Director of Medical and Public Health Services. But in spite of reminders he was not transferred by him So, the Board in this very explanation requested the Government to intervene in this matter and get him transferred

The Government after considering this explanation was of the view that the excuse of shifting liability on the Medical Officer of Health was not satisfactory and if this officer was not really performing his duties properly the Board should have brought this matter to the notice of the Government directly instead of entering in any unnecessary correspondence with the Director of Medical and Public Health Services, particularly when the Government in its order dated 17th May, 1967 had given the present Board one year's time to improve the sanitary conditions of the city So, it cannot be said that these reasons stated by the Government in support of its finding are not germane to the controversy involved in the charge.

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Charge no 6 related to the Board's wilful failure to make proper arrangement for lighting of public streets which was one of its duties enjoined by s 7(1)(a). It was specially stated that most of the road in the city remained dark and the condition of lighting of streets specially in civil lines areas where the officers' houses were situate was very bad and in spite of District Magistrate's repeatedly drawing the attention of the Board to this fact it did not bring about any improvement. The Board in its explanation did not deny that the condition of lighting of public streets was bad but again tried to shift the blame on others' shoulders, i.e. the State Electricity Board in this case. It was stated that the State Electricity Board under its agreement with the Board was bound to replace fused bulbs but it was not doing so. In the same explanation a request was made to the Government to intervene between these two local authorities i.e. the Board and the State Electricity Board, to settle this matter. The Government did not think this explanation satisfactory as no such request was made to the Government previously and only when the charges were served on the Board on this score that it came out with this request and tried to shift the blame on the State Electricity Board. The Government took the view that it was a wilful failure on the part of the Board to perform its statutory duty. It cannot be said that this finding also is not supported by reasons germane to the controversy.

From the above it is evident that with the possible exception of Charge no 3 (3) all other charges on the

basis of which action has been taken by the State Government against the board are supported by reasons which have been stated in the order as published in the Gazette and those reasons are not irrelevant or not germane to the controversy. The Government has further stated in this order that in its view each of these charges individually is sufficient to justify the supersession of the Board. Hence even if Charge no 3(3) is excluded, the decision of the Government could not have been different.

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In the end it may be stated that respondent no. 1 who is the President of the Board in his writ petition after entering in self-praise of himself tried to give him a certificate of good conduct and efficiency in the discharge of his duties as President. But he alone does not constitute the Board. He cannot vouchsafe to the integrity and efficiency of all the members of the Board or even a majority of them. On the other hand, he himself had alleged that some of the members of the Board were corrupt and self-seekers who did not like the President's efforts to improve the affairs of the Board and they could bring the majority of the members of the Board to their point of view so as to pass a motion of no confidence against him on 25th May, 1970 though this motion was subsequently found illegal by this Court on some technical grounds in another writ petition filed by the President. In our opinion, the supersession of such a Board by the State

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Government cannot be said to be unjustified and the order of supersession does not suffer from any legal infirmity

We accordingly allow this appeal, set aside the order passed by the learned single Judge and dismiss the writ petition filed by the respondent with costs to the appellants.

*Appeal-allowed.*

## CRIMINAL REVISION

Before Mr Justice K N Srivastava and Mr Justice  
H N Kapoor

FATEH SINGH

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v

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BADAN SINGH AND ANOTHER

RESPONDENTS.

**Criminal Procedure Code**, 1898, s 145 and **Indian Oaths Act**, 1969, s 3(2)—Case under s 145 of the former Act—Affidavit to be sworn before the Magistrate ceased of the case

Affidavit in a case under s 145, Cr P C has to be sworn before the Magistrate who is ceased of the case and not before any Magistrate or any other officer not ceased of the case unless a notification is issued by the High Court or by the State Government as laid down under s 3(2) of the Oaths Act

Criminal Revision no 781 of 1971 from the order of A B MATHUR, Civil and Sessions Judge, Kanpur, dated the 19th of April, 1971 in Criminal Revision no 215 of 1970

G P Dixit, for the Applicant

S K Dongre, for the Respondents

K N SRIVASTAVA, J —This revision has been laid before us on a reference made by Hon'ble C D. PAREKH, J The facts of the case lie within a narrow campus The only point which has been canvassed before us is as to whether an affidavit filed in a case has to be sworn before the court concerned or before any Magistrate

The learned Judge making the reference was of the opinion that if the law was interpreted to him that the affidavit was filed in a court has to be sworn only before that court, then it would certainly result in great inconvenience to the person swearing the affidavit and in this view of the matter, the learned single Judge was of the opinion that the affidavit may be sworn

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 before any authority contemplated under s 4 of the Oaths Act and it may be looked into as evidence of the party in a litigation under s 145, Cr P C

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Under s 145(4), Cr P C it is only mentioned that the parties are entitled to file documents and affidavits. The Code of Criminal Procedure does not lay down the mode of swearing the affidavit except ss 539, 539-A and 539-AA of the Code of Criminal Procedure. A perusal of these three sections makes it abundantly clear that these sections relate to affidavits which are sworn before this Court and, therefore, s 539-AA lays down that an affidavit to be used before any court other than a High Court under s. 510-A or 539-AA may be sworn or affirmed in the manner prescribed in s 539 or before any Magistrate. S 539, Cr P C lays down:

“Affidavits and affirmations to be used before any High Court or any officer of such court may be sworn and affirmed before such court or the ‘clerk of the State’, or any Commissioner or other person appointed by such court for that purpose, or any Judge or any Commissioner for taking affidavits in any court of record in ‘India’, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.”

In view of this, therefore, recourse has been taken to the Indian Oaths Act and the Notaries Act, 1952. S 3 of the Oaths Act reads as below:

“3 *Power to administer oaths*—(1) The following Courts and persons shall have power to administer, by themselves or, subject to the provisions of sub-s. (2) of s 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge

of the duties imposed or in exercise of the powers conferred upon them by law, namely—

(a) all Courts and persons having by law or consent of parties authority to receive evidence;

(b) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station

(2) Without prejudice to the powers conferred by sub-s (1) or by or under any other law for the time being in force, any Court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits if empowered in this behalf—

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or

(b) by the State Government in respect of other affidavits "

A perusal of this section, therefore, makes it abundantly clear that under sub-s. (2) of s 3, any Court, Judge or Magistrate can administer oath provided that Court, Judge or Magistrate is authorised by the High Court to administer oath or is authorised by the State Government. No notification has been brought to our notice issued by the High Court or State Government giving such authority to any Court, Judge or a Magistrate and, therefore, sub-s (2) would not be applicable unless such a notification is issued

Thus we have to fall back upon s 3 which lays down that affidavits can be administered by Courts in discharge of the duties imposed or in exercise of the powers conferred upon them by law. Any Magistrate

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cannot administer oath to a person outside his powers and duties. In view of sub-s (1) of s 3, a Magistrate who is ceased of a case under s 145, Cr P C can, therefore, only administer oath to a person swearing an affidavit and no other Magistrate who is not ceased of the case and who in discharge of duty or power conferred upon him has no jurisdiction over the case can administer oath to a person swearing an affidavit.

In this very connection, reference may be made to s 8(1)(c) of the Notaries Act, 1952 which reads as below:

"8(1) A Notary may do all or any of the following acts by virtue of his office, namely—

(c) administer oath to, or take affidavit from, any person,"

This power being given to the Notaries under the Act is only limited to such persons who are appointed Notaries under this Act and not to Magistrates, Courts or other officers to whom this Act does not apply. In the instant case, oath was not administered to the person swearing the affidavit by any Notary.

It is true that inconvenience may be caused to a litigant but the Legislature, in its wisdom, has enacted s. 3(2) of the Indian Oaths Act to relieve the litigant public of such hardships. It is for the High Court or the State Government to issue the necessary notification and unless that notification is issued, the law courts have to apply the law as it stands and inconvenience, if any, caused cannot be removed by giving an interpretation which the words used in the section do not permit.

Our attention was also drawn to certain earlier decisions of this Court. The first case is *Wahid v State* (1). The learned counsel for the applicant contended

(1) A I R 1963 All 256,



that this case was decided prior to the amendment of the Oaths Act in 1969 and, therefore, this decision, being based on the interpretation of the earlier provisions of the Oaths Act, would not at all be applicable. We have discussed in the earlier part of the judgment that even in the amended Act, the power to administer oath lies with the Magistrate or Court or officer who is ceased of the case in exercise of the powers conferred over him or in discharge of the duties imposed upon him. A perusal of *Wahid's* case goes a long way to show that it is in conformity with the view we have taken.

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Similar view has been taken in *Paramhans Singh v Mst Seva* (1). This case came before UNIYAL, J on a difference of opinion before H C P TRIPATHI and C B CAPOOR, JJ. UNIYAL, J agreed with the view taken by C B CAPOOR, J and held that affidavits under s 145, Cr P C were to be sworn before the Magistrate who was ceased of the case.

The latest pronouncement is by Mr Justice S D SINGH in *Govind v State* (2). This case also supports the view we have taken.

For the reasons given above, we are, therefore, of the opinion that affidavits in a case under s 145, Cr P. C has to be sworn before the Magistrate who is ceased of the case and not before any Magistrate or any other officer not ceased of the case unless a notification is issued by the High Court or by the State Government as laid down under s 3(2), of the Indian Oaths Act.

The reference being replied, let the case be laid before the Bench concerned.

*Reference answered*

(1) 1966 A W R 757,

(2) A.I.R. 1969 All 405,

## CIVIL MISCELLANEOUS

Before Mr Justice S Chandra and Mr Justice  
N D Ojha

BHAGWATI SINGH

PETITIONER,

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BOARD OF REVENUE AND

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RESPONDENTS.

**U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 20(b)**—*Interpretation of the phrase "entitled to regain possession thereof" in s 20(b)(ii)*—*Whether the word "thereof" refers to land to which first part of s 20(b)(i) applies or to land referred to in s 27(1) (c) of the U P Tenancy (Amendment) Act, 1947*

The word "thereof" in the second part of s 29(b)(i) refers to that very land which falls within the purview of its first part and no *adhivasi* rights were intended to be granted either under the first part or under the second part of s 20(b) of the Act in respect of a land held by a sub-tenant referred to in the proviso to sub-s (3) of s 27 of the Act of 1947

Civil Miscellaneous Writ no 4292 of 1969 connected with Civil Miscellaneous Writ no 302 of 1970.

S. N Singh, for the Petitioner

N. Lal and S. C., for the Respondents

S. CHANDRA, J —A learned single Judge has referred the following question of law to a Bench

"Whether the respondents became *adhivasis* of the land in dispute under the latter part of cl (b) of s 20, Zamindari Abolition and Land Reforms Act?"

It appears that the respondents trespassed on the land in dispute on or about 12th December, 1939. The landholder instituted a suit for the ejectment of the respondents under s 180 of the U P Tenancy Act on 7th February, 1942. The suit was decreed on 28th March, 1943. In execution of the decree the landholder took possession on 21st May, 1943. After com-

ing into force of the U P Tenancy (Amendment) Act, 1947 (hereinafter referred to as the Act of 1947) the respondents made an application for being reinstated under s 27(1)(c) thereof. The application was at first dismissed at the trial stage but in appeal the Collector allowed it on 28th March, 1951 by passing an order of reinstatement. Since in the meantime the petitioner had been inducted as tenant by the landholder, the Collector declared him to be sub-tenant entitled to remain in possession for three years. The question is whether the respondents became *adhrvasis* under s 20(b) of the U P Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act). S 20 of the Act so far as is relevant for the purposes of the present case reads as under

“20 Every person who—

(a)

(b) was recorded as occupant,—

(1) of any land other than grove land or land to which s 16 applies or land referred to in the proviso to sub-s (3) of s 27 of the U P Tenancy (Amendment) Act, 1947 in the Khasra or Khatauni of 1356F prepared under ss 28 and 33 respectively of the U P Land Revenue Act, 1901, or who was on the date immediately preceding the date of vesting entitled to regain possession thereof under cl (c) of sub-s (1) of s 27 of the U P Tenancy (Amendment) Act, 1947,  
or

(11) .. . . .

shall, unless he has become a *bhumidhar* of the land under sub-s (2) of s 18 or an *asami* under cl (h) of s 21, be called *adhrvasi* of the

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land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof

*Explanation I*—Where a person referred to in cl (b) was evicted from the land after 30th June, 1948, he shall notwithstanding anything in any order or decree, be deemed to be a person entitled to regain possession of the land "

On a plain reading of the section it is apparent that the first part of cl (b)(i) applies to land other than three categories of land

- (1) grove land,
- (2) land to which s 16 applies, and
- (3) land referred to in proviso to sub-s (3) of s 27 of the U P Tenancy (Amendment) Act, 1947

A person recorded in 1356F gets *adhivasi* rights if the land on which he was recorded is land other than of these three categories. In the second part, which refers to cl (c) of sub-s (1) of s 27 of the 1947 Act a reference has been made to land by using the word 'thereof'

The principal controversy raised before the learned single Judge and upon which he referred the question mentioned above was in regard to the interpretation of the word 'thereof'. The word 'thereof' in the phrase 'entitled to regain possession thereof' obviously refers to land. The question is to which land this word refers to. Whether it refers to land to which first part of s 20 (b)(i) applies or to land referred to in s 27(1) (c) of the Act of 1947. The word 'thereof' means 'of that', namely, referred to earlier. In cl (b)(i) of s 20 of the Act, there is no reference before the word 'thereof' to land

referred to in s 27(1)(c) of the Act of 1947. Though the two parts of cl (b)(1) of the Act deal with different situations yet they have been enacted as parts of the same clause. In the first part it refers to land other than the three categories of land mentioned above and in the latter part it refers to land by using the word 'thereof' which obviously refers to the same category of land as contemplated by the first part. If the Legislature had a contrary intention it would not have used the word 'thereof' and in its place would have at the end used the words 'of land referred to therein'. This clause would have then read.

"Who was on the date immediately preceding the date of vesting entitled to regain possession under cl (c) of s (1) of s 27 of the U. P. Tenancy (Amendment) Act, 1947 of land referred to therein."

The matter can be looked at from another point of view. A sub-tenant referred to in the proviso to sub-s. (3) of s 27 of the Act of 1947 becomes an *asami* of the land occupied or held by him on the date immediately preceding the date of vesting under s 21(1)(c) of the Act notwithstanding anything contained in s 20. S 200 of the Act makes him immune from ejectment except as provided in this Act. The provision in this behalf is contained in s 202 of the Act under which he has been made liable to ejectment on the suit of the landholder and if there is no landholder on the suit of the Gaon Sabha, if he holds the land from year to year or for a period which has expired or will expire before the end of the current agricultural year. The Legislature wanted such a person to be ejected only by the landholder or the Gaon Sabha as the case may be.

Landholder in view of s 3(26) of the Act has the meaning assigned to this word in the U P Tenancy

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Act and in the context of a sub-tenant referred to in the proviso to sub-s. (3) of s. 27 of the Act of 1947 would mean the person who had let out the land before the 1st day of September, 1946 in the contingency contemplated by the said proviso to the person who becomes a sub-tenant by virtue of the proviso. The right to eject such a sub-tenant was not intended to be given to any person other than the landholder or the Gaon Sabha. The right to file a suit for ejectment under s. 209 of the Act was given to one of the three tenure-holders recognised by the Act, namely, *bhumidhar*, *sirdar* or *asami* but the right to file a suit under s. 202 was not given to even these tenure-holders. It was specifically reserved for the landholder. This would be clear on a plain reading of the phraseology of the two sections. A suit under s. 202 could, therefore be filed only by such person who was landholder irrespective of the nomenclature which may have been given to him under the Act. The right to file a suit under this section was not only not given to the three tenure-holders under the Act but also not to an *adhivasi*. It was for this reason that the land occupied by a sub-tenant referred to in the proviso to sub-s. (3) of s. 27 of the Act of 1947 was excluded from the first part of s. 20(b) (i) specifically and from its second part by using the word 'thereof'. For otherwise the person on whom s. 20(b)(i) of the Act conferred *adhivasi* rights would have by virtue of his being entitled to regain possession under the said section become, as a necessary corollary, entitled to eject such a sub-tenant and that too forthwith irrespective of the fact whether the term for which the sub-tenant was holding the land had expired or not or the other requirements of s. 202 had been fulfilled or not the restrictions placed by s. 202 being applicable only to a suit filed by the landholder under the said section and not to a proceeding initiated

by an *adhivasi* for recovery of possession. It would also create an anomalous situation wherein the right to eject the sub-tenant would stand confirmed simultaneously on two persons—on the *adhivasi* under s 20 and on the landholder under s 202 of the Act. Here this anomaly would be glaring as the respondents are admittedly not the landholder of the sub-tenant referred to in the proviso to sub-s (3) of s 27 of the Act of 1947. This corroborates the view that the word 'thereof' in the second part of s 20(b)(i) refers to that very land which falls within the purview of its first part and no *adhivasi* rights were intended to be granted either under the first part or under the second part of s 20(b) of the Act in respect of a land held by a sub-tenant referred to in the proviso to sub-s (3) of s 27 of the Act of 1947.

So far as the present case is concerned there is yet another ground on which the respondents cannot be held to have become *adhivasis* under s 20(b)(i) of the Act. As already pointed out, on an application made by them under s 27(1)(c) of the Act of 1947, an order was passed by the Collector on 28th March, 1951 for their reinstatement and the petitioner was declared to be a sub-tenant entitled to remain in possession for a period of three years. This period had not expired till the date immediately preceding the date of vesting and was in fact to expire on 28th March, 1954. As such the petitioner was entitled to remain in possession on the date immediately preceding the date of vesting and the respondents obviously could not be deemed to be the persons who were entitled to regain possession on the said date. Whether they had a right to regain possession at any subsequent stage or not would be immaterial because of the specific words 'who was on the date immediately preceding the date of vesting entitled

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to regain possession thereof used in s 20(b)(i) of the Act.

We would, therefore, answer the question referred by saving that the respondents did not become *adherents* under s 20(b)(i) of the U P. Zamindari Abolition and Land Reforms Act. Let the papers be laid before an appropriate single Judge for disposal of the writ petition with this answer and opinion

*Question answered*

### CIVIL MISCELLANEOUS (FULL BENCH)

Before Mr Justice K B Asthana, Mr Justice R B Misra and Mr Justice Gopi Nath

GINDORI BIBI

PETITIONER,

*v.*

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TAXING OFFICER AND OTHERS

RESPONDENTS

*Court Fees Act, 1870, s 5—Jurisdiction of Taxing Officer—Opinion as to importance of the question—Mandatory duty to refer to the Taxing Judge*

The Taxing Officer while exercising his jurisdiction under s 5 of the Court Fees Act is under a mandatory duty to form an opinion as to the importance of the question when invited to do so within a reasonable time even after he had rendered his own decision on the merits of the question and then refer the same for final decision of the Taxing Judge, if the question is found to be of general importance

—, s 5—*Question of general importance is to be decided by the Taxing Officer—High Court can quash his decision by a writ of certiorari*

It is for the Taxing Officer to decide judicially whether the question is one of general importance and the High Court can quash the decision by a writ of *certiorari* in the exercise of its jurisdiction under Art 226 of the Constitution if it were found that the duty cast on him to form an opinion was not performed judicially. The expression "When the question is



in his opinion of general importance" occurring in s 5 does not leave any discretion with the Taxing Officer but imposes a duty on him to examine in each case before him whether the question was of general importance, more so when invited to do so by the party affected

Constitution of India, Art 226—*Issue of mandamus to the Taxing Officer—Reference to the Taxing Judge.*

A *mandamus* can be issued to the Taxing Officer under Art 226 of the Constitution compelling him to examine the case and form a opinion as to the importance of the question and then refer to the Taxing Judge in the event of his finding that the question was one of general importance even though the Taxing Officer himself had decided the question on merits.

Civil Miscellaneous Writ no 5354 of 1970.

*Bashir Ahmad*, for the Petitioner

*V. K. Burman* and *S C*, for the Opposite-parties

K B ASTHANA, J.—Smt Gindori Bibi filed a Suit No 44 of 1951 before the District Judge of Mathura against the Treasurer of Charitable Endowments for U P and others for a declaration that the plaintiff being the legal heiress of the property left by her husband Sri Beniram Kapoor and the same not being subject to any legal trust for charitable purposes, decree be passed divesting the Treasurer of Charitable Endowments of U P and the defendants nos 2 to 7 of the property given in Sch A of the plaint and from management and administration of the same. A decree for rendition of accounts was also claimed. In the plaint it was averred that the death of Sri Beniram Kapoor occurred on 15th September, 1943 at Mathura and the plaintiff as his widow and legal heiress succeeded to the property left by him and obtained possession of the same. Then a reference was made to a Will having been executed by Sri Beniram Kapoor on 27th March, 1934 entrusting the management of his estate to the Collector of Mathura and for payment of cash to his daughter and maintenance of the plaintiff. It was averred that the Will was not validly executed and any

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trust created therein was illegal and invalid. The relief for declaration was valued at Rs 70,000 but a court-fee of Rs 18-12 was paid. The relief for accounting was valued at Rs 200 and court-fee of Rs 19-6 was paid. The Inspector of Stamp reported that in his opinion *ad valorem* court-fee was payable under s 7(iv-A) of the Court Fees Act. The learned Civil Judge, trying the suit, held that proper court-fee was paid and rejected the report. The Chief Inspector of Stamps then came up to the High Court in revision under s 6-B of the Court Fees Act, but the revision was dismissed as the plaint had been amended in the court below. Thereafter the suit proceeded and was dismissed. Smt Gindori Bibi being unsuccessful filed a first appeal in the High Court on a court-fee of Rs 222-50. The Stamp Reporter of the High Court made a report on 1st July, 1966 pointing out a deficiency of Rs 15,315. The learned counsel for the plaintiff-appellant objected and his objection was considered by the Taxing Officer, who by his order dated 11th August, 1970 rejected the objection and upheld the report of the Stamp Reporter. It appears that the relief claimed in the memorandum of appeal was then allowed to be amended. A fresh report was made by the Stamp Reporter to the effect that besides the declaratory court-fee of Rs 200 under Art 17(iii) of Sch II of the Court Fees Act the plaintiff-appellant was further liable to pay *ad valorem* court-fee of Rs 7,735 under s 7(iv-A) on the market value of the property in suit as the relief claimed involved the cancellation and adjudging void of a Will. A deficiency of Rs 7,735 was reported. Against the report the learned counsel for the appellant filed an objection claiming that the memorandum of appeal was sufficiently stamped. The Taxing Officer heard the learned counsel for the appellant and by his order dated 18th August, 1970 rejected the objection and

called upon the plaintiff-appellant to make good the deficiency of Rs.7,735 in the court-fee on the memorandum of appeal. On 26th August, 1970 the learned counsel for the appellant filed an application before the Taxing Officer praying that the Taxing Officer be pleased to refer the case for final decision to the Chief Justice or any Hon'ble Judge to be appointed by the Chief Justice under s 5 of the Court Fees Act. The Taxing Officer on the same date passed the following order:

"The Taxing Officer has already given his decision and no question of any reference of the matter to the Court by Taxing Officer arises. The counsel presenting this application insists that it must be accepted by the Taxing Officer. Hence the application is taken from and the above order passed. It is again made clear that the Taxing Officer has no reasons to make any reference to the Court as prayed. The application is, therefore, filed."

Smt Gindori Bibi then filed a petition under Arts 226 and 227 of the Constitution of India for the quashing of orders passed by the Stamp Reporter and the Taxing Officer in respect of the court-fee payable on the memorandum of first appeal filed in the High Court by her. A *mandamus* was also sought for directing the Taxing Officer to refer the question of deficiency in court-fee to the Court under s. 5 of the Court Fees Act.

The petition was heard by our brother K N SINGH. On behalf of the petitioner reliance was placed on a Division Bench decision of this Court in *Maharaja Sir Pateshwari Prasad Singh v. Taxing Officer* (1), in support of the contention that the High Court had power

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to issue a writ of *mandamus* to the Taxing Officer directing him to refer the question of deficiency to the Court under s 5 of the Court Fees Act Brother K. N. SINGH doubted the correctness of the aforesaid Division Bench decision and by his order dated 19th April, 1972 referred the following three questions for the consideration of a larger Bench.

1 Whether the Taxing Officer while exercising his jurisdiction under s 5 of the Court Fees Act is under a mandatory duty to refer the question regarding payment of court-fee to the Chief Justice or the Taxing Judge?

2 Whether the question that the point involved was of general importance is to be decided by the Taxing Officer himself or by this Court in exercise of jurisdiction under Art 226 of the Constitution?

3 Whether any *mandamus* can be issued to the Taxing Officer under Art 226 of the Constitution compelling him to refer the question regarding payment of court-fees under s 5 of the Court Fees Act to the Chief Justice or the Taxing Judge even though the Taxing Officer himself has decided the question on merits?

When the matter came up before a Division Bench of this Court, after hearing the learned counsel for the parties, it felt that the matter should more appropriately engage the attention of a Full Bench. This is how the reference has come before this Bench.

The answer to the questions referred will turn on the interpretation of the language of s. 5 of the Court Fees Act. That section runs as follows:

"5. When any difference arises between the Officer whose duty it is to see that any fee is paid

under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Court, be referred to the Taxing Officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf

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When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court

The Chief Justice shall declare who shall be Taxing Officer within the meaning of the first paragraph of this section."

As the marginal note to the section shows, it prescribes the procedure in case of difference as to necessity or amount of fee. The Stamp Reporter of the High Court is the Officer under s 5 whose duty is to see the necessity of paying a fee or the amount thereof on any document received or furnished in the High Court, *inter alia*, in its appellate jurisdiction. When any difference arises between the Stamp Reporter and the appellant's learned counsel in regard to the amount of fee payable on the memorandum of appeal the question shall be referred to the Taxing Officer. The Joint Registrar of the High Court is the Taxing Officer under s. 5. Finality attaches to the decision of the Taxing Officer in the sense that no appeal or revision lies

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therefrom, but where the Taxing Officer is of the opinion that the question is one of general importance he shall refer the question to the final decision of the Chief Justice of the High Court or of such Judge of the High Court as the Chief Justice appoints either generally or specially in this behalf referred to hereafter for convenience as the "Taxing Judge".

According to s 5 on a difference arising between the Stamp Reporter and the appellant's counsel as to the amount of court-fee payable on the memorandum of appeal the question shall be referred to the Taxing Officer who will decide the question and finality will attach to his decision. Neither the appellant nor the State have any right to question the decision of the Taxing Officer before the Court by way of appeal or revision. It is the Taxing Officer himself who can destroy the finality of his decision if he forms an opinion that the said question was of general importance in which case he shall refer the question for the final decision of the Taxing Judge.

In the case of *Maharaja Sri Pateshwari Singh v. Taxing Officer* (1), the Division Bench took the view that once it were found that the question of necessity of fee or deficiency in the amount thereof was of general importance the Taxing Officer was bound to refer it for the final decision of the Taxing Judge. Since it was conceded in the said case that the question was of general importance the Division Bench accepted the writ petition, quashed the order of the Taxing Officer and directed him to make a reference to the Taxing Judge. The Division Bench was not invited to consider the question as to whether the Taxing Officer could be compelled by a writ of *mandamus* to form an opinion as to the importance of the question and if so at what

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stage of the proceedings Also before the Division Bench no point was raised whether the Court could form an opinion as to the nature and importance of the question in the exercise of its jurisdiction under Art 226 of the Constitution.

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Brother K N SINGH in his referring order first considered the merits of the question and found that the Taxing Officer had not committed any such error as to be amenable to a writ of *certiorari* Then he considered the argument raised on behalf of the petitioner that the Taxing Officer failed to exercise the jurisdiction vested in him in refusing to refer the question in respect of the appellant's liability to pay court-fees on *ad valorem* basis It appears that the argument presented before the learned Judge by the learned counsel proceeded on the assumption that the question raised was one of general importance and the Taxing Officer was under a legal duty to refer the matter to the Taxing Judge The learned Judge construed the language of s 5 as vesting a discretion in the Taxing Officer to refer or not to refer the question for final decision of the Taxing Judge and opined that since it was a matter of discretion, no *mandamus* could be issued directing the Taxing Officer to refer the question The learned Judge also doubted the jurisdiction of this Court to consider whether the question was one of general importance.

Thus the crucial question that requires consideration is whether a reference to the Taxing Judge by the Taxing Officer is only a matter of discretion on latter's part or is he under a duty to make a reference after forming an opinion as to the importance of the question of court-fee payable, more so when invited to do so On this part of the case it was suggested by the learned counsel for the petitioner that the Division

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Bench in *Maharaja Sri Pa'eshwan Singh v. Taxing Officer* (1) rightly held that s 5 imposed a duty on the Taxing Officer to make a reference to the Taxing Judge once it were found that the question was of general importance. The learned counsel, however, ultimately conceded that on the language of s 5 it is the Taxing Officer who has to form an opinion whether the question was one of general importance. He, however, submitted that once it was established before the Taxing Officer that the question was one of general importance, the matter will fall out of his jurisdiction and it will be the Taxing Judge who at once will have the jurisdiction to decide the question, the reference will then be mandatory under the scheme of the section as once the question is one of general importance the final decision will be that of the Taxing Judge. It was pointed out that by refusing to consider whether the question was one of general importance, the Taxing Officer can always seize jurisdiction and render his own decision final, a situation which could not be countenanced on the language of the section for its object would be frustrated if a discretion were held to be vesting in the Taxing Officer, to form or not to form an opinion as to the importance of the question of court-fee and the suitor would be deprived of the benefit of the final decision of the Taxing Judge even though the question be one of general importance.

The learned Standing Counsel appearing for the respondents contended that primarily under the section the Taxing Officer has the jurisdiction to record a decision on the question referred to him by the Stamp Reporter and once he takes a decision thereon he would be *functus officio* and then no question would arise of forming of an opinion by him whether the question

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was of general importance. The Taxing Officer cannot, therefore, be invited after he had rendered his final decision to refer the question for the final decision of the Taxing Judge as it is at his discretion to form an opinion which discretion must be exercised by him before rendering his own decision on the merits of the question of court-fee. This argument of the learned Standing Counsel involves a construction on the language of the section that the Taxing Officer is not required or is under no duty to record his own decision where the question is one of general importance as the case will then fall out of his jurisdiction. It was suggested by the learned Standing Counsel that the appellant on whose memorandum of appeal the deficiency was reported ought to have invited the Taxing Officer to form an opinion as to the importance of the question before the Taxing Officer rendered his decision on merits and the petitioner having omitted to do so, the Taxing Officer rightly rejected his application for making a reference and this Court in the exercise of its jurisdiction under Art 226 of the Constitution cannot compel the Taxing Officer to make a reference to the Taxing Judge, howsoever it may appear to this Court that the question as to deficiency in court-fee which arose was one of general importance.

On a close examination of the arguments advanced by the learned counsel for the parties there appears to be a parallelism to certain extent in their approach in regard to the respective power and jurisdiction of the Taxing Officer and the Taxing Judge conferred by s 5. It is implicit in the approach of both the learned counsel that there is a division of power, all ordinary questions referred by the Stamp Reporter in respect of the court-fee fall within the jurisdiction of the Taxing Officer for decision while all questions which are of

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general importance are to be decided by the Taxing Judge, that is to say under the scheme of the section the Taxing Officer is precluded from rendering a decision on the question which is of general importance. This is an approach which is difficult to be accepted. There is no doubt that the language of s 5 as also of many other sections of the Court Fees Act is complicated and defective. It has been observed by learned Judges in many cases decided by various High Courts that the Court Fees Act is notorious for its bad drafting. However, that is hardly a matter for consolation. Howsoever involved and defective the drafting of a provision of the statute be it is the duty of the court to interpret and construe it.

It appears to us that there is no division of functions or jurisdiction under the provisions of this section in the sense as canvassed by the learned counsel. A direct reference by the Stamp Reporter for rendering of a final decision by the Taxing Judge is not envisaged. Every reference at first has to be made to the Taxing Officer by the Stamp Reporter. The Stamp Reporter is not required to classify the question as a preliminary step in the category either of ordinary importance or of general importance. Once a question is referred to the Taxing Officer on a difference arising between the Stamp Reporter and the suitor, it is the duty of the former to render a decision thereon irrespective of the fact whether the question was of ordinary importance or of general importance. The Taxing Officer is under a duty to render his decision on merits. Having done that the Taxing Officer has to consider whether the question is one of general importance and once he is of the opinion that the question is one of general importance, then the decision rendered by him on merits will not be final and he will be under a duty to refer the question for the final decision of the Taxing

Judge Thus the procedural scheme under the section is that the Taxing Judge will get the jurisdiction to render a final decision on the question of the court-fee only when the Taxing Officer refers the question. The stage for reference by the Taxing Officer to the Taxing Judge would only arrive after the rendering of the decision on merits by him on the question referred by the Stamp Reporter. We do not find any substance in the contention that a reference by the Taxing Officer to the Taxing Judge on a question of general importance has to be made without first rendering on merits his own decision thereon. There is no dichotomy of functions or jurisdiction under the scheme of this section. Every reference on a question of difference has first to be considered and decided by the Taxing Officer whose decision ordinarily would be final but the decision of the Taxing Officer would not be final if it is found by him that the question was one of general importance then the procedure prescribed casts a duty on the Taxing Officer to refer the question for final decision of the Taxing Judge.

Having cleared as best we could the meaning which could intelligently be given to the involved language now we proceed to consider whether the words "except when the question is, in his opinion, one of general importance in which case he shall refer it to the final decision of the Chief Justice. . . ." occurring in s. 5, leave it to the sweet will of the Taxing Officer not to form an opinion as to the importance of the question. If that were so then simply by declining to form an opinion the Taxing Officer can always give finality to his own decision and deprive the aggrieved party from getting the benefit of the opinion of the Taxing Judge though the question be one of general importance. We ought not countenance a construction of the section as to vest a discretion in the Taxing

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Officer in such a matter of crucial concern to the litigant unless we are compelled to do so by the force of the language

Can the expression "when the question is, in his opinion, one of general importance" be construed as imposing a duty on the Taxing Officer to examine the nature of the question in every case and form an opinion as to its importance as on that will depend the exercise of power by the Taxing Judge for the benefit of the suitor or the Government as the case be? It appears to us beyond doubt and it has been disputed that once the Taxing Officer formed an opinion that the question was one of general importance then he is bound to refer the question for the final decision of the Taxing Judge. No discretion is left in that event with the Taxing Officer. He is under a duty to make a reference of the question to the Taxing Judge where he is of the opinion that the question is one of general importance. The object of the section calling for the final decision of the Taxing Judge on a question of general importance would be frustrated if it were held that it was at the discretion of the Taxing Officer to form an opinion or not to form an opinion. There is nothing in the scheme of this section preventing a suitor to invite by application the Taxing Officer to form an opinion as to the importance of the question. A suitor or the State as the case be will be under no necessity to invite the opinion of the Taxing Officer on the importance of the question for obtaining the final decision of the Taxing Judge until and unless the Taxing Officer rendered on merits his decision on the question adverse either to the suitor or the State.

The Taxing Officer has to perform a judicial function under s. 5. In forming an opinion as to the importance of the question he is under a duty to act judicially and not arbitrarily. We think any opinion

rendered by him on the importance of the question may be amenable to a writ of *certiorari* if in forming his opinion the Taxing Officer proceeded arbitrarily and against established judicial principles. It is not open to the Taxing Officer to decline at his sweet will forming of an opinion on the importance of the question. In the case of *Commissioner of Income-tax v. Minnion and Co* (1), the Supreme Court had occasion to construe the expression "in the opinion of the Income-tax Officer" occurring in the proviso to s 13 of the Income Tax Act, 1922 and held that those words did not confer a mere discretionary power and in the context it imposed a statutory duty on the Income-tax Officer to examine in every case the method of accounting employed by the assessee and to see whether or not it has been regularly employed and to determine whether income, profits and gains of the assessee could properly be deduced therefrom. We think in the context in which the expression "when the question is in his opinion, one of general importance" occurring in s 5 does not leave any discretion with the Taxing Officer but impose a duty upon him to examine in each case before him whether the question was of general importance, more so when invited to do so by the party affected. The learned Standing Counsel in support of his contention that the Taxing Officer is under no duty to make a reference to the Taxing Judge on an application made to him after he had rendered his decision on the question referred relied upon the case of *Ajazzuddin v Taxing Officer* (2). It appears that in that case the Taxing Officer was invited by an application to make a reference after three months of the rendering of the decision by him on the question. In that connection DWIVEDI, J who decided the case observed

"In para 5 of the petition it is admitted that the petitioner came to know of the impugned order

(1) AIR 1958 SC 207

(2) AIR. 1966 All. 227

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in the middle of May 1963. Nevertheless no earlier steps were taken by him to seek proper remedy against the order. Three months thereafter on 16th August, 1963 for the first time he made an application to the Taxing Officer to refer the question of the court-fees to the Taxing Judge. Thus the request was obviously belated and futile. After the Taxing Officer had decided the issue of court-fee he could not refer the matter to the Taxing Judge."

We do not think that the above quoted observations of DWIVEDI, J. lay down the law that the Taxing Officer had absolute discretion in the matter and could not be compelled to refer the question of court-fee to the Taxing Judge. On the other hand in the observations quoted there is an implied hint that had the petitioner taken early steps the matter would have been different. The petitioner in fact was penalised by the learned Judge as the request for reference was obviously belated. Be that as it may, if the latter observation of DWIVEDI, J. to the effect that after the Taxing Officer had decided the issue of court-fee he could not refer the matter to the Taxing Judge be taken to be as laying down a rule of law, we do not find ourselves in agreement with it.

It has not been disputed by the learned Standing Counsel that a direction in the nature of *mandamus* can always be issued by the High Court in the exercise of its jurisdiction under Art. 226 of the Constitution calling upon a Tribunal or an Authority under a duty to act judicially to perform its judicial function in the manner prescribed by law. Since we have held above that under the scheme of s. 5 the Taxing Officer is under a duty to form an opinion as to the importance of the question of the court-fee payable a direction can

be issued by the Court calling upon the Taxing Officer to form an opinion judicially on the importance of the question referred to him by the Stamp Reporter and if he finds that the question is of general importance then his decision on the merits of the question will not be final and he must refer it for the final decision of the Taxing Judge

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We are not impressed with the submission of the learned Standing Counsel that the Taxing Officer in his order dated 26th August, 1970 had applied his mind to the importance of the question and he did not find the question as one of the general importance that being implicit in his observation "the Taxing Officer had no reason to make any reference to the Court as prayed" We think the order of the Taxing Officer dated 26th August, 1970 is primarily based on the circumstance that the Taxing Officer had already on merits rendered his decision, therefore, no question of any reference arose

As a result of the discussion above, our answer to the first question referred is that the Taxing Officer while exercising his jurisdiction under s 5 of the Court Fees Act was under a mandatory duty to form an opinion as to the importance of the question when invited to do so within a reasonable time even after he had rendered his own decision on the merits of the question and then refer the same for final decision of the Taxing Judge, if the question is found to be one of general importance.

Our answer to the second is that it is for the Taxing Officer to decide judicially whether the question was one of general importance and this Court can quash the decision by a writ of *certiorari* in the exercise of its jurisdiction under Art 226 of the Constitution if it

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were found that the duty cast on him to form an opinion was not performed judicially.

Our answer to the third question referred is that a *mandamus* can be issued to the Taxing Officer under Art. 226 of the Constitution compelling him to examine the case and form an opinion as to the importance of the question and then refer it to the Taxing Judge in the event of his finding that the question was one of general importance even though the Taxing Officer himself had decided the question on merits

*Questions answered*

## APPELLATE CIVIL

*Before Mr. Justice M N Shukla and Mr Justice  
K. N Seth*

1978  
April, 19.

JYOTI PRASAD GUPTA AND OTHERS APPELLANTS,  
v.  
HIRA LAL RESPONDENT

*Transfer of Property Act, 1882, ss 54 and 58(c)—Mortgage with conditional sale and sale with a condition of repurchase—Determination of real character of transaction—Prior relationship of debtor and creditor not crucial*

The guiding principles in determining the real character of a transaction appear to be that if the words are plain and unambiguous they must be given their true real effect in the light of the attending circumstances but the phraseology employed is not always decisive. In a mortgage with conditional sale a relationship of debtor and creditor is created under the transaction and for the debt a charge is created on the



property conveyed but in a sale with an agreement to reconvey neither a relationship of debtor and creditor is created nor is price charged upon the property conveyed. The real distinction between the two transactions is the relationship of debtor and creditor the transfer being a security for the debt. The existence of a prior relationship of debtor and creditor is not crucial unless it is continued by the transaction under consideration.

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—, ss 54 and 58—*Reconveyance of property with a stipulated period—Indicative of mortgage*

If the condition as to reconveyance imposes an obligation on the transferor to get the property reconveyed within stipulated period, it is indicative of a mortgage but that would not be the case where no such obligation is cast.

First Appeal No 184 of 1970 from the judgment and order of D K Agarwal, 1st Additional Civil Judge, Meerut, dated 13th August, 1970 in Civil Suit No 161 of 1968

G D Srivastava, for the Appellant

Ashoka Gupta, B. Gupta and K C Agarwal, for the Respondent

K N SETH, J —This appeal arises out of a suit brought by the plaintiffs-appellants for redemption of a mortgage on the allegation that the plaintiffs were the heirs and successors-in-interest of Mannu Lal and Girdhari Lal who had executed a mortgage deed with conditional sale on 8th May, 1929 in favour of the defendant who was a minor at that time. It was alleged that the deed in question and the circumstances attending the execution of the deed clearly indicated that a mortgage with conditional sale was intended and was in fact executed. The plaintiffs asserted that the value of the property was not less than Rs 88,000 at the time of the mortgage, that there existed a relationship of debtor and creditor between the parties; that the predecessors-in-interest of the plaintiffs never intended to make an out and out sale, and that the language of the deed made it clear that it was a mortgage deed.

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The defendant denied the plaintiff's allegations and asserted that the deed in question was not a mortgage deed with conditional sale but was an out and out sale with a condition of repurchase. It was pleaded that the disputed property had been mortgaged with the defendant on 26th April, 1924 for a consideration of Rs 20,000, that the mortgagors were unable to pay the amount of principal or the interest and they decided to sell the property in favour of the minor defendant for a consideration of Rs 29,000, that the vendee, as a concession, granted a right to the vendors to repurchase the property within a period of ten years for the same consideration, that the time was the essence of the contract and as the vendors had failed to exercise the option within the stipulated period of ten years, the plaintiffs were not entitled to reconveyance of the property now after a lapse of 40 years. It was also pleaded that Smt Chaula Devi, the certificated guardian of the minor defendant, had no right to transfer or bind the estate of the minor without the leave of the court and the agreement to reconvey the property was unenforceable in law. The assertion of the plaintiffs that the value of the property in 1929 was Rs 88,000 was denied and it was asserted that it was even less than Rs 29,000 but as there was no other means for the recovery of the debt, he consented to get a sale deed in his favour. The defendant claimed to have been dealing with the property as an owner for the last 40 years and invested a sum of Rs 20,000 towards its improvement. According to the defendant one Nain Singh was a tenant in the property in suit and after his ejection as a result of protracted litigation the plaintiffs, in collusion with Nain Singh, have filed the present suit to harass the defendant and the suit was liable to be dismissed.

On a consideration of the terms of the document in question and the surrounding circumstances the trial

Court arrived at the conclusion that the deed in question was an out and out sale and not a mortgage with conditional sale. The learned Judge held that the time was the essence of the contract and the plaintiffs and no right to repurchase but as the plaintiffs did not claim the right of repurchase the issue really did not arise. Similarly the question whether Smt Chaula Devi was competent to enter into a contract of reconveyance did not arise for decision. It was also held that as it was a case of sale, the defendant was within his rights to make improvements and the improvements belong to him. The suit was accordingly dismissed giving rise to the present appeal.

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It is not always easy to determine whether a particular transaction is a mortgage by conditional sale or a sale outright with a decision of repurchase. The language almost invariably employed is one of outright sale but the terms incorporated in the deed and the attending circumstances reveal the real intention of the contracting parties. The vexed nature of the question has resulted in numerous decisions by the courts and certain broad principles have been formulated but ultimately each case has to be decided on its own facts and circumstances as two documents are seldom found to be couched in identical language and the circumstances attending the execution of different documents can rarely be comparable.

S 58(c) of the Transfer of Property Act defines 'mortgage by conditional sale' as follows.

"Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or

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on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale,

Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale"

The proviso added by Act XX of 1929 came into force with effect from 1st April, 1930 (after the execution of the deed in question) It does not, however, follow that if the condition is incorporated in the deed effecting or purporting to effect a sale, a mortgage with conditional sale must necessarily have been intended LORD GRANWORTH in *Alderson v White* (1) enunciated the principle thus:

"The rule of law on this subject is one dictated by commonsense, that '*prima facie*' an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase . . . . In every such case the question is, what, upon a fair construction, is the meaning of the instruments?"

The principle was elaborated by SHAH, J in *Bhaskar Waman Joshi v Shrinarayan Rambilas Agarwal* (2) in these words:

"The question whether by the incorporation of such a condition a transaction ostensibly of sale

(1) (1858) 44 E R 924.

(2) AIR 1960 SC 801

may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingeri Gyanageri v P Parthasaradhi* (1), the circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertain-

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(1) 51 Ind App 305, AIR 1924 P C 226

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ed from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts."

The same principle was reiterated in *P L Bapuswami v N Pallay Gounder* (1)

The guiding principles in determining the real character of a transaction appear to be that if the words are plain and unambiguous they must be given their true legal effect in the light of the attending circumstances but the phraseology employed is not always decisive. In a mortgage with conditional sale a relationship of debtor and creditor is created under the transaction and for the debt a charge is created on the property conveyed but in a sale with an agreement to reconvey neither a relationship of debtor and creditor is created nor is price charged upon the property conveyed. The real distinction between the two transactions is the relationship of debtor and creditor, the transfer being a security for the debt. The existence of a prior relationship of debtor and creditor is not crucial unless it is continued by the transaction under consideration.

The document (Ex A-2) involved in the present appeal indicates that the executants were owner in possession of the property in question since its purchase in 1917. They were indebted to the tune of Rs 20,000 to the transferee and had mortgaged it in his favour under a registered deed

(1) AIR 1966 SC 902

dated 11th April, 1924. The debtors had failed to pay even the interest on the amount borrowed and their indebtedness had swelled to about Rs 29,000 which they were unable to discharge in spite of pressing demand from the creditor. The debtors expressed a desire that the creditor should get a sale deed executed in respect of the property on the condition that if the executants, within a period of ten years, pay the amount of Rs 29,000, which was to be the consideration for sale, they would get back the property, and this offer was accepted by the creditor. It was in these circumstances that the transaction in dispute was entered into between the parties. The executants transferred all their rights and interests for a consideration of Rs.29,000, which was set off in full payment of the amount due under the mortgage deed dated 11th April, 1924, and put the vendee in possession. One of the terms incorporated in the deed was that the vendors could pay the amount of Rs 29,000 within a period of ten years, by mortgaging or selling the property to some one else. Another significant term was that within the period of ten years the vendee could make further constructions or additions in the property after giving a registered notice to the vendors and obtaining their permission. If fresh constructions or additions were made, with the permission of the vendors as stipulated, the vendors, at the time of reconveyance would be liable to compensate the vendee for the investments made by him. A warranty clause was also incorporated in the deed safeguarding the title and possession of the vendee in all circumstances.

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The language employed in the deed is unmistakably common to a deed of sale. In fact, one has to search in vain for any word that may be found in a deed of mortgage. However, as the language employed is not deci-

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sive to determine the real character of the document, the circumstances attending the execution of the document and the terms incorporated therein may be analysed. It is apparent that the executants were indebted to the transferee and a relationship of debtors and creditor existed when the document in question was executed. Under the mortgage deed of 11th April, 1924 the property in dispute stood charged for the payment of the debt. The existence of a prior relationship of debtors and creditor is a circumstance to be taken note of but it is not crucial. The requirement of law is that the relationship of debtor and creditor should be created or continued under the document itself. In the document under consideration there was absolutely no indication that any relationship of debtor and creditor was either created or continued between the parties or a charge was created on the property for the payment of any debt. There was no stipulation for any accounting. In a mortgage deed one would normally expect to find such a term at the time of reconveyance of the property. The document is also silent about payment of any interest over the consideration money. Under the prior mortgage the creditor was entitled to an interest of eleven annas per cent per mensem. The absence of any stipulation about interest is indicative of a sale rather than a mortgage. It was contended by the appellants that as the transferee was to be put in actual possession of the property, it was not considered necessary to incorporate any term with regard to payment of interest as the loss of interest would have been compensated by being in enjoyment of the property. It may be noted that after the execution of the deed in question, the transferors executed a rent note in favour of the transferee and agreed to pay a rent of Rs 125 per month. The rent note was only for a period of ten months and the trans-



lessors actually vacated the premises after that period. Thereafter one Lala Ram Swarup came into possession of the premises in question as a tenant on a rent of Rs 60 per month. Three years later Nain Singh occupied the premises as a tenant and executed a rent note on the same terms. It is thus obvious that except for a period of ten months when the transferors occupied the premises on rent, the transferee received only Rs 60 per month. This could hardly be considered as a compensation for the interest that the defendant would have earned by way of interest. Calculated at the rate which was agreed to by the parties under the deed of 1924, the interest would have amounted to about Rs 200 per month. In such a circumstance we feel that the absence of any stipulation about interest in the document in question lends support to the stand taken by the defendant. Learned counsel for the appellant asserted that there was in fact a stipulation for payment of interest in the document. We may point out that that stipulation finds a place under the warranty clause wherein it was provided that in the event of the transferee losing title or possession of the property on account of any defect in the title of the transferors, he could be entitled to realise the whole amount of his consideration money with interest at the rate of eleven annas per cent per mensem. That stipulation could not be interpreted to mean that the defendant was entitled to any interest on the amount paid by him as if it was a loan advanced by him to the plaintiffs.

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It was then contended that the fact that the property was to be reconveyed for a sum of Rs 29,000 which was the consideration money for the transaction in question, indicated that really a mortgage with conditional sale was in the contemplation of the parties. This circumstance, in our opinion, is not a determining factor

1973 and can be consistent with a case of mortgage with con-  
 JAGJI PRASAD ditional sale and an outright sale with an agreement for  
 GUPTA reconveyance [See *Mst Qayumunissa v Rashdul*  
 " Malik (1)]  
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The fact that the entire consideration for the deed in question was utilised in satisfaction of the previous debt secured under the mortgage deed of 1924 is also not indicative that a mortgage with conditional sale was intended. The plaintiffs were not in a position to discharge the previous debt and the interest was steadily mounting. In order to avoid progressively increasing liability, the debtors could have decided to sell the property rather than perpetuate their indebtedness and allow it to grow from day to day. The debtors were admittedly in strained circumstances and unable to discharge their liability even for interest. A desire to execute a sale deed in such circumstances would be quite natural.

It was next contended that under the deed in question restrictions were placed on the transferee with regard to the enjoyment of the property and such a restriction indicated that absolute title was not intended to be conveyed. In the deed it was stipulated that the vendors shall have a right for reconveyance of the property in their favour within a period of ten years and the money could be raised by sale or mortgage of the same property. It was also provided that in case the vendee wanted to make any further constructions, he could do so by giving a registered notice to the vendors and after obtaining their permission. It was urged that the right reserved by the vendors to mortgage or sell the property and the restriction imposed on the vendee were consistent only with a case of a mortgage with conditional sale. We find it difficult to accept this contention. It was stipulated that the vendors

could get the property reconveyed within a period of ten years. It was also stipulated that in case additional constructions were made with the permission of the vendors, the vendee would be entitled to be compensated for the amount invested by him. If in these circumstances it was stipulated that the vendee would obtain prior permission of the vendors before raising any constructions, the term could not be treated as inconsistent with the case of an outright sale with an agreement to reconvey. Similarly, the right reserved by the vendors to mortgage or sell the property in order to raise money for reconveyance of the property in their favour did not derogate from the absolute title sought to be conveyed under the deed in question. The rights reserved by the vendors and the restrictions imposed on the vendee were for the limited period of ten years during which the vendors could exercise the right of reconveyance and did not affect the absolute the document.

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The plaintiffs were entitled to exercise their right to have the property reconveyed in their favour within a period of ten years. It was urged that this long period was indicative of the fact that a mortgage with conditional sale was intended by the parties. In our opinion this circumstance also is of no avail to the plaintiffs. In *Ram Das Rae v Brindaban Ram* (1) a period of twelve years and in *Mst Qayumunissa v. Rashidul Malik* (2) a period of ten years was provided for reconveyance of the property but the documents in question were held to be outright sale. The period of ten years during which the right of reconveyance was to be exercised could not provide a guide for determining the true nature of the transaction.

(1) A I R 1931 All 118

(2) A I R 1952 All 200

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The factum of transfer of actual physical possession has often been considered as a relevant factor in determining the true character of the transaction. It has been held that if possession remains with the transferor it is indicative of a mortgage with conditional sale. On this basis it was contended that in the present case actual physical possession remained with the transferors which belied the plea of the defendant that the transaction in dispute was one of outright sale and the fact that a rent note was executed was another mode to maintain the fiction of sale. In the document it has been clearly recited that the executants, after removing themselves from proprietary possession and occupation, have put the vendee in proprietary possession and occupation of the property. Immediately after the execution of the disputed document the vendors executed a rent note in favour of the vendee. It is thus obvious that the vendors ceased to be in proprietary possession of the property. Their possession after the execution of the rent note was in the capacity of tenants. If proprietary possession was transferred by the vendors, it could not be successfully urged that the transferee did not come in possession of the property and it remained with the transferors. The circumstance that the transferors remained in actual physical possession of the property is also not helpful to the plaintiffs' case.

It is well established that if the consideration paid for the transfer of a property has no relation to the real market value of the property, it is a clear indication of mortgage with conditional sale and where the price represents the correct market value it would indicate a sale. In the present case there is a sharp difference between the parties as to the real value of the property in dispute on the date of the transaction. The plaintiffs contended that the property in 1929 was worth an about Rs 80,000 to Rs 90,000. The plaintiffs examined

Kifayatullah (P W 1) who stated that he was a mason and had constructed the building in dispute about fifty years back. He estimated the value of the property at Rs 80,000. Jyoti Prasad (P W 6), one of the plaintiffs, stated that Rs 50,000 to Rs 60,000 were invested for the construction of the house in dispute. Sri Mannu Lal Mittal (P W 4), a retired Executive Engineer of P W D, who prepared a detailed estimate of cost of the building and submitted his report along with the maps of the building and assessed the value of the property at Rs 65,000 in 1929. The defendant examined Sri Om Prakash, a retired Executive Engineer of P W D, who assessed the value of the property at Rs 25,000 in the year 1929. The evidence of Kifayatullah appears to be utterly worthless. He was an ordinary mason and could not be expected to estimate the value of the property. In his enthusiasm to support the case of the plaintiffs he gave an estimation which was far in excess of the estimate made by the plaintiff himself. Jyoti Prasad was a young lad of 13-14 years when the alleged constructions were made and had no personal knowledge of the amount spent in making the constructions. No account books of the relevant period have been produced by the plaintiffs which could throw any light on the amount spent in constructions. The failure to produce the account books, which were admittedly maintained, creates a serious doubt about the claim put forward by the plaintiffs. The evidence of Sri Mannu Lal Mittal also does not inspire confidence. The schedule of rates which formed the basis of his report about the valuation of the property does not appear to be an authentic document and seems to have been privately prepared. As against his estimate Sri Om Prakash assessed the value of the property at Rs 25,000 in 1929. He based his calculations on the Schedule of rates of the District Board, Meerut in 1932. In view of the

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wide divergence in the estimate of the value of the property between the two retired Engineers, it would not be safe to place any reliance on their evidence

One of the accepted principles for determining the value of a property is the capitalisation of the net annual profits. The property in dispute was let out at Rs 125 per month on 8th May, 1929 and thereafter it was let out at the rate of Rs 60 per month. Even at the rate of Rs 125 per month the annual rent amounts to Rs 1,500. Deducting two months' rent towards repairs, taxes etc the net annual profit would amount to Rs 1,250 and the fair market price of the property would be twenty times the net annual profit, that is, Rs 25,000. The explanation appended to s 66 of the Transfer of Property Act also provides a guide for determining the market value of the property. It provides that a security is insufficient unless the value of the mortgaged property consisting of buildings exceeds by one-half the amount for the time being due on the mortgage. The property in question was mortgaged in the year 1924 for Rs 20,000 which would mean that in 1924 the value of the property was not more than Rs 30,000. According to the plaintiffs own evidence the value did not increase between 1924 and 1929. On the other hand the evidence on record indicates that there was a sharp set back in the price of foodgrains etc and the value of the properties had also gone down. This downward tendency continued even after 1929. In these circumstances the value of the property in question could not be more than Rs 30,000 at the relevant time even accepting that some additions had been made to the property during the period 1924 to 1929. The consideration for the disputed transaction could in no circumstance be said to be inadequate. The test of adequacy of price also is not in favour of the plaintiffs.

It may be noted that a right was reserved in favour of the plaintiffs for the reconveyance of the property but they were not obliged to exercise that right. If the condition as to reconveyance imposes an obligation on the transferor to get the property reconveyed within the stipulated period, it is indicative of a mortgage but that would not be the case where no such obligation is cast. In the present case no obligation was cast on the transferors to exercise the right of reconveyance within the stipulated period.

It was next contended that as the transferee was a minor the stipulation with regard to reconveyance would have been unenforceable against him and this circumstance also indicated that the intention of the parties was only to execute a mortgage with conditional sale. We are not impressed with this argument. This argument assumes that the agreement to reconvey was a separate and distinct transaction and although the transfer in favour of the minor was a valid transaction, the agreement to reconvey could not be enforced. This position is untenable. The sale and the agreement to reconvey form parts of the same transaction. The contract was for the benefit of the minor and was entered into through his certificated guardian and all the terms were equally binding on him. He could be legally compelled to reconvey the property if that right was exercised within the stipulated time.

The fact that the stamp for the execution of the document in question was purchased by the vendors is not a crucial factor for determining the true meaning and intent of the parties.

A very strong circumstance against the stand taken by the plaintiffs was that prior to the disputed transaction the property in question had been mortgaged in favour of the defendant only five years earlier. Dur-

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ing this period the plaintiffs had failed to meet their liability for the interest. The circumstances in which they were placed indicated that they were not in a position to discharge their obligation and the interest was progressively mounting. The defendant already held a mortgage in his favour. He would not have gained any advantage by getting a fresh mortgage deed executed. It is difficult to believe that in these circumstances the defendant could have intended to get a mortgage deed with conditional sale only. Both the parties would have been equally benefitted if the property was sold outright. The plaintiffs would have been relieved of the burden of not only of the principal amount but also of the recurring interest and the defendant would have acquired full proprietary rights over the property and would be saved of the bother of taking legal action for recovery of the amount due against the plaintiffs.

On a careful consideration of the terms of the document and the attending circumstances we are satisfied that the transaction dated 8th May, 1929 was an outright sale with an agreement to reconvey and not a mortgage with conditional sale.

In view of the above finding no other issues need any consideration.

In the result the appeal fails and is dismissed with costs.

*Appeal dismissed*

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## APPELLATE CIVIL

Before Mr Justice S Chandra and Mr Justice N. D.  
Ojha

SMT DHANAO

APPELLANT,

v

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JAGARNATH SINGH AND OTHERS

RESPONDENTS

U. P. Zamindari Abolition and Land Reforms Act, 1950, s.  
171 (as amended in 1953)—Effective from 1st July, 1952

With the exception of ss 37, 38 and 60 of the Amending Act all other sections thereof were directed to come into force from 1st July, 1952, that is to say, they were expressly given retrospective effect. The addition of sister's son as an heir by s 39 of the Amending Act XVI of 1953 was directed to take effect from 1st July, 1952.

Second Appeal no 2940 of 1964 from the judgment and decree of R K MISRA, Additional Civil Judge, Basti, dated 16th July, 1964 in Civil Appeal no 297 of 1963

Gyan Prakash, for the Appellant

Anand Pal Singh Chauhan, for the Respondents

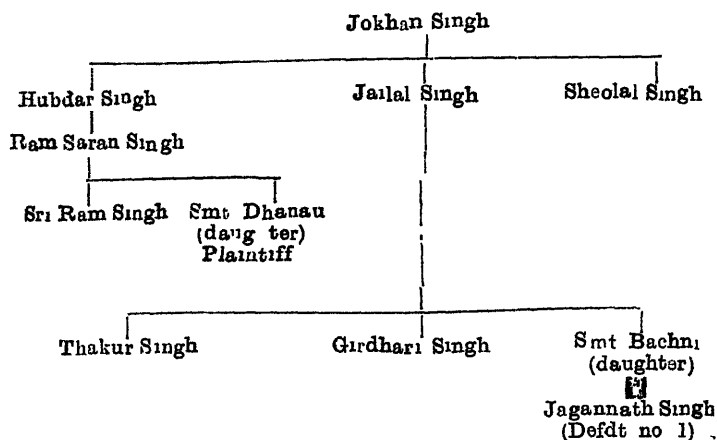
S CHANDRA, J —A learned single Judge has referred the following question to a larger Bench

“Whether s 171 of the U P. Zamindari Abolition and Land Reforms Act (Act I of 1951), as amended by U. P Act XVI of 1953, preferring a

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brother as an heir to a daughter's son, would take effect from 1st July, 1952 or prospectively."

The following is the pedigree of the family of the parties.



Smt Dhanau the plaintiff-appellant filed a suit for an injunction and in the alternative for possession. The suit related to two holdings. The plots mentioned in List A annexed to the plaint were *sir* and *khudkasht* while the plots mentioned in List B to the plaint constituted a tenancy holding. The plaintiff alleged that Sri Ram Singh and Girdhari Singh were co-sharers in the two holdings. Sri Ram Singh died prior to the date of vesting. On his death the plaintiff succeeded to his interest under the personal law in regard to the *sir* and *khudkasht* plots. In respect of the tenancy holding, on death of Sri Ram Singh, the other co-sharer Girdhari Singh co-opted Smt Dhanau as co-tenant with the consent of the zamindar. Girdhari Singh died on 6th June, 1953 leaving no one as an heir under the Zamindari Abolition Act. So under s 175 of that Act the plaintiff Smt. Dhanau as a co-sharer acquired Girdhari Singh's interest by survivorship. In this way she

became the sole tenure-holder of both the holdings. It was alleged that Jagarnath Singh defendant no 1 had on 29th March, 1957 transferred the plots of List A and B to defendants second set without having any title or interest in them. Since the defendants name had been mutated the plaintiff apprehended dispossession.

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The suit was contested by Jagarnath Singh. He admitted the pedigree set out in the plaint. He also admitted that the plots mentioned in List A were the joint *siri* and *khudkasht* of Shri Ram Singh and Girdhari Singh and that plots of List B constituted a tenancy holding. It was alleged that the plaintiff had transferred her interest in plots of List A to one Suraj Singh. The allegation that Girdhari Singh had co-opted the plaintiff as a co-tenant was denied and it was alleged that by virtue of the Amending Act no XVI of 1953 a *sirdar* son became an heir to a *sirdar* and so on death of Girdhari Singh Jagarnath Singh defendant no 1 succeeded to his interest.

The trial court held that the Amending Act no XVI of 1953 was constitutionally valid and the defendant Jagarnath Singh was the rightful heir to the interest of Girdhari Singh. The plaintiff Smt Dhanau in fact had sold her interest in the *bhumidhari* holding. She had no right to sue. The allegation that Girdhari Singh had co-opted the plaintiff as a co-sharer in the tenancy of the holding was not proved. On the death of Shri Ram Singh his interest in it passed on to Girdhari Singh by survivorship because the former had left no heir. Girdhari Singh was the sole heir of the plots in the tenancy holding, and his interest was inherited by the defendant Jagarnath Singh. On these findings the suit was dismissed. The plaintiff went up in appeal but failed. Aggrieved she came up to this Court in second appeal. She challenged the finding that the Amending Act no XVI of 1953 was constitutionally valid.

1973 A learned single Judge finding a conflict of opinion in  
 SMT DHANAO this Court, referred the question mentioned above to  
 JAGANNATH a larger Bench  
 SINGH

S. Chandra, It will be seen that the dispute is whether a sister's  
 son could validly be an heir The question referred to  
 us in so far as it raises the controversy whether the  
 Amending Act no XVI of 1953 preferring a brother as  
 an heir to a daughter's son is valid is wrongly framed.  
 The question should be

"Whether s 171 of the U P Zamindari Abolition and Land Reforms Act (Act I of 1951), as amended by U P Act XVI of 1953, adding a sister's son as an heir would take effect from 1st July, 1952 or prospectively?"

A sister's son is an heir under Hindu Law A sister's son has always been an heir under all the tenancy laws prevailing in this State from time to time The Zamindari Abolition Act came into force on 1st July, 1952 In the table of succession laid down in it by s 171 a sister's son was not an heir S 39 of the U P Zamindari Abolition and Land Reform (Amendment) Act, XVI of 1953 which came into force on 19th June, 1953 introduced the sister's son as an heir in s 171 S 1 sub-s (2) of the Amending Act XVI of 1953 stated

"1(2) It shall be deemed to have come into force from the first day of July, 1952 except ss 37, 38 and 60 which shall come into force at once"

With the exception of ss 37, 38 and 60 of the Amending Act all other sections thereof were directed to come into force from 1st July, 1952, that is to say, they were expressly given retrospective effect The addition of a sister's son as an heir by s 39 of the Amending Act XVI of 1953 was directed to take effect from 1st July, 1952.

For the appellant it was urged that when Girdhari Singh died on 6th June, 1953 the Amending Act XVI

of 1953 had not come into operation. At the moment of the death of Girdhari Singh there was in law no one who could succeed as an heir. So Girdhari Singh's interest went to the plaintiff by survivorship. Once Girdhari Singh's interest vested in the plaintiff, a law which operated to divest her of her rights in property would be violative of the fundamental rights guaranteed under Arts 19(1)(f) and 31(1) of the Constitution. The Amending Act XVI of 1953 in so far as it gave retrospective effect to s 39 was unconstitutional.

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On the finding of fact that Girdhari Singh did not co-opt the plaintiff as a co-tenant, Girdhari Singh's interest could not in law vest in the plaintiff by survivorship. The constitutional question sought to be raised on her behalf does not really arise, but since a specific question has been referred to this Bench we proceed to consider it. When a statutory enactment expressly gives retrospective operation to its provisions it does so by creating a fiction. In *State of Bombay v Pandurang* (1) MAHAJAN, J, speaking for the Supreme Court, held:

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

He quoted with approval the following observations of Lord ASQUITH in *East End Dwellings Co Ltd v Finsbury Borough Council* (2).

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited

(1) AIR 1953 SC 244

(2) (1952) AC 109

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from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it

The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs "

In *Commissioner of Income-tax v S Teja Singh* (1) VENKATARAMA AIYAR, J, after quoting with approval the abovementioned observations of Lord ASQUITH held.

"It is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate "

The Amending Act XVI of 1953 directs that a sister's son will be deemed to be an heir under s 171 of the Zamindari Abolition Act with effect from 1st July, 1952, the date on which the principal Act came into operation. We have already noticed that a sister's son was always an heir under the Revenue laws of the State. He was for some reason left out from the principal Act and this mistake was sought to be rectified by Amending Act XVI of 1953 retrospectively. The intention of the Legislature was clearly expressed that a sister's son would be an heir from the beginning of the commencement of the Zamindari Abolition Act. This being the legislative intent the court must not let its imagination to boggle when it comes to the corollaries of the fictional state of affairs. It must assume all those facts on which alone the fiction can operate. The fiction created by the Amending Act XVI of 1953 can operate only

(1) A I R 1959 S C, 352.

when it is assumed that a sister's son was an heir in cases where the succession opened after 1st July, 1952. If this is assumed, then the position would be that the sister's son was an heir entitled to succeed when Gir-dhari Singh died on 6th June, 1953. The necessary consequence which equally well has to be assumed is that there being an heir, no one could succeed by survivorship under s. 175 because on its terms s. 175 operates only when there is no heir at all.

So giving full effect to the legal fiction the resultant position is that succession by survivorship never took place. There is no question of divesting any rights in property which had become vested by survivorship. No question of an infringement of fundamental rights guaranteed by Art. 19(1)(f) or Art. 31 would arise.

Art. 31(1) permits deprivation of property by authority of law. Art. 31(2) requires payment of compensation, but before Art. 31(2) can operate it must be established that the deprivation has been because of acquisition by the State or in favour of any Corporation owned by the State. S. 39 of the Amending Act XVI of 1953 does not seek to acquire any one's right in favour of the State or a State Corporation. Even according to the plaintiff the effect is that the rights of the plaintiff are taken away and vested in the defendant. To such a state of affairs Art. 31(2) is not attracted.

In *Tej Bahadur Singh v Board of Revenue* (1) brother ASHTANA, J. repelled the submission that the retrospective operation of the U. P. Act XVI of 1953 affected vested rights. It was held that once the deeming clause is given its full effect, no right whatsoever could vest in the daughter's son on 24th March, 1953 as on that day the law would be that it is the brother who will prefer over the daughter's son.

(1) 1968 R.D. 27.

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In *Puran v State of U P* (1) a learned single Judge held that the retrospective operation of s 39 violated Arts 19(1)(f) and 31(1) of the Constitution and so the provisions of that section would operate only prospectively. The learned Judge did not consider the effect and the manner of operation of legal fiction. We are unable to sustain this view.

Our answer to the question referred to us is that the addition of sister's son as an heir takes effect from 1st July, 1952 and not prospectively.

Let the papers be returned to the learned Judge concerned with this opinion and answer.

*Question answered*

## CRIMINAL REVISION

*Before Mr Justice B D Gupta*

CHUNNI LAL ... APPLICANT,

*v.*

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STATE

.. RESPONDENT.

**Prevention of Food Adulteration Act, 1954, s. 20—Punishment under s 7/16 of the Act—Foodstuff found coloured with a coal-tar dye—Sanction for prosecution accorded by District Medical Officer of Health simply by putting the signature—Without applying his mind—Sanction illegal—Conviction to be set aside**

Where the sanctioning authority did not apply its mind to the case at all and its signature for sanction was a purely mechanical act, *held*, that there was no valid consent as required by law and the prosecution of the applicant was unauthorised.

(1) Writ Petition no 2579 of 1965 decided on 22-12-1969



Criminal Revision no 128 of 1971 from the order dated 18th January, 1971 passed by 1st Temporary Civil and Sessions Judge, Kanpur, in Criminal Appeal no 549 of 1970

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*K M Dayal*, for the Applicant

*S C*, for the Respondent

B D GUPTA, J —The applicant Chunnī Lal has been convicted for the offence punishable under s 7/16 of the Prevention of Food Adulteration Act, the sentence being rigorous imprisonment for six months and fine in a sum of Rs 1,000

The prosecution case, which, in the opinion of the courts below, stood established, was that on the morning of 26th September, 1969, the applicant sold *Baloo-sahi* in a fair held within the jurisdiction of Police Station Sikandra in the district of Kanpur, which, on analysis by the Public Analyst, was found coloured with a coal-tar dye not permitted for use in articles of food meant for human consumption

The principal contention raised before me is that in the present case the prosecution failed to establish the necessary consent for prosecution of the applicant as required by s 20 of the Prevention of Food Adulteration Act (hereinafter referred to as the Act) After hearing learned counsel for the parties at some length and scrutinising the material on record I am inclined to accept this contention

The document on record, which has been relied upon by the prosecution, as complying with the requirements of s 20 of the Act is a sheet of paper, one side of which is marked as Ex Ka-4 and the other side of which is marked as Ex Ka-5 The side of the paper marked as Ex Ka-4 makes it out to be the intended

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complaint against the applicant. The court mentioned at the top thereof is "the court of Sri J P Singh, S D M, Bhagnipur, Magistrate First Class, Kanpur". The entire document is in the handwriting of the Food Inspector and is signed by him at its bottom. The date given at the bottom is 1st December, 1969. The other side of the paper, which has been marked Ex Ka-5, purports to be the document according sanction for the prosecution of the applicant. All the entries in Ex Ka-5, except the signature purporting to be that of the District Medical Officer of Health, Kanpur, as also the date and the office number thereof, are also in the handwriting of the Food Inspector. At the top of Ex Ka-5 the office of origin is described as "office of the District Medical Officer of Health, Kanpur". At the bottom of Ex Ka-4 the expression "P T O" is found written and it is not in controversy that the entire body of writing in Ex Ka-4, as also the entire body of writing in Ex Ka-5, except for the signature purporting to be that of the Medical Officer of Health, Kanpur and the entry of the date and the reference number, were all made by the Food Inspector on or before the 1st of December, 1969. It is, therefore, manifest that at the time the Food Inspector formulated the complaint in regard to which consent in writing under s 20 of the Act, was required before the case was sent to court for prosecution of the applicant, the Food Inspector took it for granted that necessary consent would be given. At the time the Food Inspector wrote out what forms part of the writing in Ex Ka-5 he left four blank space. The first was after the expression "No ", the second was after the word "Dated", the third was after the expression "the court of Sri" and before the expression "Magistrate First Class, Kanpur" and the fourth was over the designation of the officer

concerned entered as "District Medical Officer of Health, Kanpur." It would, therefore, appear that all that the Food Inspector let to be done later on was entry of the reference number of the office, the date of according sanction, the reference of the court to which the complaint was to be sent and the signature of the District Medical Officer of Health. Of the four blank spaces, mentioned above, three were filled in later but the space left for specifying the court to which the complaint was intended to be made was not filled in.

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Besides the paper, referred to above, the two sides of which have been exhibited as Exs Ka-4 and Ka-5 the only other material on record bearing on the question of sanction consists of the statement of the Food Inspector, which is to the effect that after drawing up of his *challan* report against the accused he had sent the same to the office of the District Medical Officer of Health for sanction. He also stated that the signature, purporting to be that of the District Medical Officer of Health was that of Sri V N Srivastava, D M O H, whose signature he could identify. In cross-examination he admitted that body writing in Ex Ka-5 was in his own handwriting. On the above material there is no room for doubt that the document (Ex Ka-5) purporting to be the written consent required by s 20 of the Act has been signed by the District Medical Officer of Health and it is not in controversy that he is authorised by the State Government to give the necessary consent as required under s 20 of the Act. The question, however, which arises is as to whether on the material before me and the internal evidence offered by the entries in Exs Ka-4 and Ka-5 it is possible to accept, what is normally to be presumed, that the authority concerned applied his mind before appending his signature in Ex Ka-5,

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 CHANDIA After considering the matter somewhat carefully I  
 cannot get over the conviction that in the present case  
 STAIR the signature of the sanctioning authority was append-  
 ed without that authority having applied its mind to  
 B. D. the matter at all  
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The Food Inspector should have merely forwarded the body of document, Ex Ka-4 to the sanctioning authority without doing anything more. It is surprising that he should have presumed that the sanctioning authority will accord the necessary permission as is obvious from the entries in Ex Ka-5. The heading of Ex Ka-5 "Office of the District Medical Officer of Health Kanpur" makes it manifest that the entries in Ex Ka-5 were contemplated to be made by the office of the sanctioning authority and not by the Food Inspector who was the prosecutor. Further, in Ex Ka-5 the entry in the blank after the expression "No" and the entry of the date opposite the expression "Dated" is in ink different from the ink in which the signature of the District Medical Officer of Health appears. This makes it manifest that the District Medical Officer of Health did not himself make any entry about the date on which he signed Ex Ka-5. What is most important is the blank in Ex Ka-5, after the expression "To the court of Sri". The fact of this blank leaves no room for doubt that the District Medical Officer of Health did not care to read what stood written in Ex Ka-5 at the time he signed it. Learned counsel for the applicant has pointed out the circumstance that in Ex Ka-5 the name of the applicant is not mentioned anywhere. This circumstance, however, does not appear to be of much significance, but, as stated earlier, in the state of material referred to above I am convinced that the sanctioning authority did not apply its mind before appending his signature in document Ex Ka-5.

Learned counsel for the State has referred to a decision in *State through Nagar Mahapalika, Varanasi v. Prem Prakash Jauhar* (1) as also to a decision of the Jammu and Kashmir High Court in *Jammu Municipality v Faquir Husain* (2). I have no doubt that no particular form of sanction is necessary, nor is it necessary that any reasons for according sanction need be put forward by the sanctioning authority. I have also no doubt that the mere fact that sanction had been granted in a printed form and did not mention that the authority concerned had examined the record and had satisfied itself about the desirability to prosecute the offender did not justify a finding that the sanctioning authority had not applied its mind to the facts of the case. In the present case, however, the internal evidence furnished by Ex Ka-5, which has been discussed above, has convinced me beyond doubt that the sanctioning authority did not apply its mind to the case at all and that its signature in Ex Ka-5 was a purely mechanical act. The provisions about the punishment for the offence alleged to have been committed by the applicant are drastic inasmuch as the law provides a minimum rigorous imprisonment for six months together with a minimum of fine in a sum of Rs 1,000. In regard to an offence considered so serious by the Legislature the authorities on whom the duty to accord sanction is cast are expected to pay more attention than appears to have been paid by the officer concerned in the present case. In view of the conclusion I have arrived at I have no option except to hold that there was no valid consent as required by law and the prosecution of the applicant was unauthorised. The result is that the conviction of the applicant must be quashed.

The next question is whether fresh proceedings should be directed. In regard to this matter it may first

(1) AIR 1966 All 504

(2) AIR 1968 J & K. 17.

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be noted that the alleged offence was committed over 3½ years ago. What is more important is the amount of harassment and expense the applicant must have already passed through in the course of having to defend himself in the trial court followed by the filing of appeal to the appellate court and the revision which is before me in this Court. It is also manifest that the applicant has already served as an undertrial, though for short periods only, not less than thrice. Taking all these circumstances into account I do not consider it proper to direct fresh proceedings against the applicant.

Accordingly this revision is allowed, the conviction of the applicant and the sentence awarded are set aside, and the proceedings against the applicant resulting in the aforesaid conviction and sentence are quashed. The applicant is on bail. He need not surrender. His bail bonds are discharged. Such fine, if any, as may have been already realised from the applicant shall be refunded to him.

*Revision allowed*

## APPELLATE CIVIL

*Before Mr Justice G. C. Mathur and Mr Justice  
H. Swarup*

GANGA DEVI AND ANOTHER . APPELLANTS,

*v.*

JIWA RAM AND OTHERS . RESPONDENTS

U. P. Zamindari Abolition and Land Reforms Act, 1950, s 157(2) and 176—*Lessee becoming an asami—Entitled to move an application under s 157(2)*

S 176 and s 178 apply to entirely different set of circumstances. They deal with a case where the suit is filed by a

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*bhumidhar* or *sirdar* for partition, i.e. for the separation of his own share while s 157(2) deals with the separation of the share of the lessor at the instance of the lessee *asami* or any tenure-holder. S 157(2) contemplates only an application for separation of the lessor's share without necessitating a partition suit. The right conferred by s 157(2) is an independent right conferred by the Legislature to meet the exigencies of special set of circumstances and consequently the lessee who has become an *asami* under s 133(b) is entitled to make an application under sub-s (2) of s 157.

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Special Appeal No 635 of 1967 against the judgment and order of S. CHANDRA, J in Civil Miscellaneous Writ no 2315 of 1966, dated 19th May, 1967.

K C. Saxena, for the Appellants

H. S. Joshi and S. C., for the Respondents

H SWARUP, J :—This appeal is directed against the judgment of a learned single Judge allowing the writ petition filed by Jiwa Ram Respondent no 1 and quashing the orders of the Revenue Courts

One Data Ram was a co-tenure-holder of plot no 41. In 1954 he sold his share in the plot to Smt Ganga Devi. On 24th December, 1958, Smt Ganga Devi executed a lease of her share in the joint holding in favour of Madho Singh. Madho Singh then made an application under sub-s (2) of s 157 of the U P Zamindari Abolition and Land Reforms Act for the separation of the share of his lessor Smt. Ganga Devi. The application was mainly contested by Kalyan Das and after his death by his son Jiwa Ram Respondent no 1. The application was allowed by the trial court, an appeal against the order of the trial court was dismissed by the Additional Commissioner and a second appeal was dismissed by the Board of Revenue. Jiwa Ram then filed a writ petition in this Court. The learned single Judge held that Madho Singh the lessee was not entitled to make the application under sub-s (2) of s 157 and quashed the order of the Revenue

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Courts. Against the judgment of the learned single Judge Madho Singh and Smt Ganga Devi have preferred this appeal.

H Swarup, J. The main point argued before us was whether the lessee had a right to file the application for partition under s 157(2) S 157 runs as under:

"157(1) A *bhumidhar* or a *sirdar* or an *asami* holding the land in lieu of maintenance allowance under s 11 who is—

(a) unmarried woman, or if married, divorced or separated from her husband or whose husband suffers from any of the disqualifications mentioned in cl (c) or (d) or a widow,

(b) a minor whose father suffers from any of the disqualifications mentioned in cl. (c) or (d) or has died,

(c) a lunatic or an idiot;

(d) a person incapable of cultivating by reason of blindness or other physical infirmity;

(e) prosecuting studies in a recognized institution and does not exceed 25 years in age and whose father suffers from any of the disqualifications mentioned in cl (c) or (d) or has died;

(f) in the Military, Naval or Air service of the India Dominion; or

(g) under detention or imprisonment; may let the whole or any part of his holding

Provided that in the case of a holding held jointly by more persons than one, but one or more of them, but not all are subject to the disabilities mentioned in cls (a) to (g) the person or persons may let out his or their share in the holding.



(2) Where any share of a holding has been let out under the proviso to sub-s. (1), the court may on the application of the *asami* or any tenure-holder determine the share of the lessor in the holding and partition the same."

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The co-tenants in plot no 41 were *bhumidhars*. Admittedly Smt Ganga Devi was a disabled person and the other co-tenure-holders were not disabled. Smt Ganga Devi let out her entire share to Madho Singh. The case was clearly covered by the proviso to sub-s. (1) of s 157. Again, admittedly Madho Singh, being the lessee of a disabled *bhumidhar* became an *asami* under s 133(b) of the Act.

Sub-s (2) of s 157 confers the right to make the application upon "the *asami* or any tenure-holder." The question which arises for consideration is whether the words 'the *asami*' refers to the lessee who has become an *asami* under s 133(b) or to the *asami* under s 11 referred to in the opening part of sub-s (1). S 129 provides that there shall be three classes of tenure-holders, that is to say, *bhumidhars*, *sirdars* and *asamis*. All the three types of persons mentioned in the opening part of sub-s (1) will be tenure-holders.

Sub-s (2) applies to cases covered by the proviso to sub-s (1). It confers the right to get the share of the lessor separated. In cases covered by this provision, there will be three types of persons, namely, the disabled tenure-holder or tenure-holders, the tenure-holder or tenure-holders who are not disabled and the lessee. The object of the provision is to enable the separate enjoyment of the share of the lessor by the lessee and of the remaining share by the tenure-holders who have not leased out their share. Since the proviso to sub-s (1) enables a disabled tenure-holder to lease out his share, the leasing out introduces an outsider in the



*dhar* or a *sirdar* The lessee of the tenure-holder, who is an *asami* under s. 11, will not be an *asami* and, therefore, no right to make an application for separation is conferred upon such a lessee

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Learned counsel for the respondents referred to s 176 of the Act and contended that as under this section the right to get a partition of the holding was vested only in a *bhumidhar* and *sirdar*, the right to get a separation of that holding could not be deemed to have been given to their *asami* by sub-s (2) of s 157, and consequently the word *asami* in sub-s (2) of s 157 must refer to *asami* under s 11 of the Act referred to in the opening part of the section. It is also contended that as the procedure of partition given in s. 178 could not be applied to partition of the holding under s 157(2), it must be held that the *asami* under s. 133(b) had no right to claim partition. This argument is based on a misconception of the purposes of s. 157(2) and ss 176 and 178. Sub-s (3) of s 178, on which special stress was laid by learned counsel, only says that the share of such a person who has let out and to whom s. 157 applies, will be separated before partition is made in terms of s 178(1). Sub-s. (3) of s. 178 obviously refers to cases under s 157(1) and not s 157(2). Ss 176 and 178 apply to entirely different set of circumstances. They deal with a case where the suit is filed by a *bhumidhar* or *sirdar* for partition, i.e. for the separation of his own share, while s 157(2) deals with the separation of the share of the lessor at the instance of the lessee *asami* or any tenure-holder. S 157(2) contemplates only an application for separation of the lessor's share without necessitating a partition suit. The right conferred by s 157(2) is an independent right conferred by the Legislature to meet the exigencies of a special set of circumstances.

1973 We accordingly come to the conclusion that the  
 GANGA DEVI lessee who has become an *asami* under s. 133(b) is en-  
 v titled to make an application under sub-s (2) of s. 157.  
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 H Swarup, J. Learned counsel for the respondents then tried to  
 attack the judgment of the Board of Revenue on pleas  
 that are not entertainable at the stage of special appeal.  
 He contended, firstly, that Data Ram had no rights in  
 the property in dispute and hence he could not trans-  
 fer the rights to the plaintiff's lessor. Learned counsel  
 has not been able to show that this point was raised by  
 him before the first appellate court. It was not consi-  
 dered by the Board and the point was not accordingly  
 permitted to be raised by the learned single Judge.  
 Learned counsel contended that the decision in Suits  
 11 of 1942 and 41 of 1943 could not operate as *res judi-*  
*cata* for holding that Data Ram was a co-sharer in the  
 land in dispute as the grove was not in dispute in those  
 suits. We, however, find that the first appellate court  
 had held that the judgment operated as *res judicata* be-  
 cause the grove was also in dispute in that suit. This  
 finding was not challenged before the Board of Reve-  
 nue. We cannot, therefore, hold that there is any error  
 committed by the revenue courts in holding that the de-  
 fence was barred by *res judicata*.

Another point sought to be raised was that s. 133(b)  
 did not apply to the case of a grove land, and hence the  
 plaintiff could not become an *asami* and hence could  
 not file an application under s. 157(2). The determi-  
 nation of this question will depend upon the nature of  
 the land the partition of which was claimed. The  
 point does not appear to have been raised at any stage.  
 Hence we are unable to permit it to be raised at this  
 stage for challenging the order of the Board of Revenue.

Learned counsel tried to contend that application

under s 157(2) was not maintainable for partition of the grove. This point also was not raised before the revenue courts. Even in the writ petition no specific ground on this point was taken. We are, therefore, unable to quash the judgments of the revenue courts on this ground.

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The next ground contended by learned Counsel was that the lease executed by Ganga Devi in favour of the plaintiff was invalid as it was executed only by the lessor and not also by the lessee. This point was not raised before the revenue courts and cannot be permitted to be raised now.

The last point raised was that as the term of the lease had expired the plaintiff could not maintain the application. The Board of Revenue dealing with this point relied on s 190 of the Act. That section provides the contingencies on the happening of which the interest of *asami* is extinguished. Expiry of lease is not one of the contingencies mentioned in the section. On an interpretation of this section the Board took the view that even if the period of the lease had expired the plaintiff continued to be the *asami* and had a right to maintain the application. We do not find that the Board committed any manifest error of law in taking this view.

In the result, the appeal is allowed, judgment of the learned single Judge is set aside and the writ petition filed by Jiwa Ram is dismissed. In the circumstances of the case, parties will bear their own costs.

*Appeal allowed*

## APPELLATE CIVIL

Before Mr. Justice G C Mathur on a difference of  
opinion between Mr Justice S Chandra and  
Mr Justice Ojha

1978  
May, 17

LAXMI PRASAD AND OTHERS

APPELLANTS,

v.

SHIV PAL AND OTHERS

RESPONDENTS.

U. P. High Court (Abolition of Letters Patent Appeals)  
Ordinance, 1972, (Ordinance no 12 of 1972) and U P  
Act No. 33 of 1972, ss. 3 and 4—Writ petitions filed before  
the commencement of Ordinance and Act—No special ap-  
peals in revenue and consolidation matters—Special appeals  
already pending on the date the Ordinance and Act came  
into force—Competent

Except for special appeals pending on the 17th August,  
1972, all special appeals arising out of revenue suits or con-  
solidation proceedings, whether the right to file the special ap-  
peal had become vested or not in parties, have been abolished  
by s 4.

Special Appeal No 94 of 1973 from the judgment of  
K B ASTHANA, J in Civil Misc Writ No 2493 of  
1970, dated 17th January, 1973.

V K S Chaudhary, for the Appellants

S C, for the Respondents

G C MATHUR, J :—Upon a difference of opinion  
between SATISH CHANDRA, J and N D OJHA, J the  
following question has been referred to me.

“Whether this appeal is maintainable?”

The question has arisen in the following circum-  
stances.

The appellants filed a suit in the Revenue Court  
under the U P Zamindari Abolition and Land re-  
forms Act for a declaration of their title to certain  
plots of land and for possession thereof. The suit  
was dismissed by the trial court. The judgment and  
the decree of the trial court were upheld in appeal and  
in second appeal. The appellants then filed a writ

petition under Art 226 of the Constitution in this Court This was done in 1970 The writ petition was substantially dismissed by a learned single Judge on 17th January, 1973 This Special Appeal was filed on 2nd March, 1973

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While the writ petition was pending the U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance, 1972 (U. P. Ordinance No 12 of 1972) was promulgated by the Governor and came into force on 30th June, 1972 The Ordinance was replaced by U P High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1972 (U. P. Act No 33 of 1972). The Act came into force on 18th August, 1972 S 2 of this Act introduced a new s 4 in the U P. High Court (Abolition of Letters Patent Appeals) Act, 1962 S 4 so introduced reads thus.

“4(1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the commencement of this section, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of jurisdiction conferred by Art. 226 or Art 227 of the Constitution, in respect of a judgment, decree or order made or purported to be made by the Board of Revenue under the United Provinces Land Revenue Act, 1901, or the U P Tenancy Act 1939, or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or the Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956, or the Jaunsar-Bawar Zamindari Abolition and Land Reforms Act, 1956, or the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960, or by the Director of Consolidation (including any other officer purporting to exercise the powers

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and to perform the duties of Director of Consolidation) under the U P Consolidation of Holdings Act, 1953, anything to the contrary contained in cl. 10 of the Letters Patent of Her Majesty, dated 17th March, 1866, read with cls 7 and 17 of the U P High Courts (Amalgamation) Order, 1948, or in any other law notwithstanding

(2) Notwithstanding anything contained in sub-s (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this section shall be heard and disposed of as if this section had not been enacted."

Under cl 10 of the Letters Patent read with the provisions of the U P High Courts (Amalgamation) Order 1948, appeals (formerly called Letters Patent, Appeals and now called Special Appeals) lay from the judgments of the single Judge in the exercise of Civil Appellate and Original Jurisdiction to Division Benches. The U P High Court (Abolition of Letters Patent Appeal) Act, 1962, by s 3 abolished Special Appeals against the judgments of single Judges made in the exercise of Civil Appellate Jurisdiction. S. 4 which has now been introduced seeks to do the same in respect of judgments of the single Judges in writ petitions under Art 226 and 227 of the Constitution of India in certain classes of cases. A Full Bench of this Court has held the 1972 Ordinance and the 1972 Act to be constitutionally valid.

There is no doubt that s 4 abolishes certain Special Appeals against the judgments of single Judges in writ petitions arising out of revenue suits and consolidation proceedings. The question is whether it abolishes Special Appeals also in those cases where the writ petitions were filed before s. 4 was introduced.



The contention of the appellants is that in such cases the litigants had, on the dates of the filing of the writ petitions, acquired a vested right of appeal and that this vested right has not been taken away by s 4 either expressly or by necessary intendment

The principles governing such cases are well settled In *Messrs Hoosein Kasam Dada (India) Ltd v. The State of Madhya Pradesh* (1), the Supreme Court laid down.

“ . . . a right of appeal is not merely a matter of procedure. It is a matter of substantive right This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court Such a vested right cannot be taken away except by express enactment or necessary intendment An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication ”

These principles were reiterated by the Supreme Court in *Garikapati Veeraya v N. Subbiah Choudhry* (2) and in *Kasbai v Mahadu* (3)

SATISH CHANDRA, J has held that the right to file a Special Appeal against the judgment of a single Judge in a writ petition under Arts 226 or 227 of the Constitution is not a vested right He has further held that the right to file such an appeal has been taken away by s 4 On the other hand N D OJHA, J. has held that the right to file such a Special Appeal is a vested right and that the vested right has not been

(1) AIR 1958 SC 221

(2) AIR 1957 SC 540

(3) AIR 1965 SC 708.

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taken away by s 4 either expressly or by necessary implication

Before me Sri *V K Mehrotra*, learned Standing Counsel, has not contended that the right to file such a Special Appeal is not a substantive right. What he has contended is that, since it is discretionary with this Court either to grant or to refuse the relief in a petition under Art 226 or 227 of the Constitution and since the nature of the powers in the Special Appeal are also same, the right to file the Special Appeal is not a vested right. The argument is that unless the party can claim relief as of right in the appeal, the right to file the appeal cannot be said to be a vested right. It is difficult to agree with this contention. The right to file appeal was conferred by cl 10 of Letters Patent read with the provisions of the Amalgamation Order. The mere fact that the Court was not bound to grant relief will not affect the right of the party to file the appeal or affect the nature of that right. In suits under the Specific Relief Act trial courts have been given the discretion to grant or to refuse the relief claimed. Such suits are also governed by the dictum of the Supreme Court and the parties, on the date the suits are filed, acquire vested rights of appeal. Likewise, when a writ petition was filed in this Court the parties acquired a right to file an appeal, if the petition was decided by a single Judge and such a right was a vested right. In my opinion, the appellants acquired a vested right to appeal on the day in 1970 when they filed the writ petition.

The question which then arises for consideration is whether this vested right has been taken away by s 4. The answer to this question depends upon a proper interpretation of s 4. This section can be divided into

four parts. The first part is the operative part and abolishes certain classes of Special Appeals. Substantially it says:

No Special Appeal arising from a suit or proceeding instituted or commenced before or after 18th August, 1972, shall lie to the High Court.

The second sets out the classes of judgments against which the Special Appeals have been abolished. Such judgments are set out in the second part as:

Judgments of single Judges of the High Court in writ, petitions under Art 226 or 227 of the Constitution against judgments, decrees or orders of the Board of Revenue in certain revenue cases or of the Director of Consolidation in consolidation proceedings.

The third part is the *non obstante* clause. This in substance provides that

Even though the Letters Patent read with Amalgamation Order or any other law confer a right to file Special Appeal such right in the class of cases mentioned earlier shall stand abolished.

The fourth part is contained in sub-s (2) and it provides that

In spite of the abolition of the Special Appeals by sub-s (1), the appeals pending in the High Court on 17th August, 1972, shall not be abolished and shall be heard and disposed of as though they were competent appeals.

The operative part of sub-s (1) abolishes all special appeals of the classes mentioned in the second part arising out of revenue suits and consolidation proceedings whether instituted or initiated before or after s 4 came into force. Though in the heading of the

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section the word "abolition" has been used, in the text itself the words used are "no appeal . . . shall lie." The words "shall lie" are equivalent to "shall be entertainable" or "shall be maintainable" They do not necessarily show that the provision is prospective and not retrospective The special appeals which have been abolished have been described with reference to the suits or proceedings out of which they arise and not with reference to the writ petitions or the judgments of learned single Judges in those writ petitions It is true that such writ petitions and special appeals are not continuation of the suits or proceedings but they do arise out of the suits or proceedings The use of the words "instituted or commenced whether prior or subsequent to the commencement of this section" show that the intention of the Legislature was that the provision was to operate retrospectively, otherwise there could be no purpose in using these words It is not possible to agree with learned counsel for the appellant that these words are immaterial and should be treated as surplusage Surplusage is not to be lightly attributed to the Legislature To my mind, sub-s (1) abolishes all special appeals arising out of all revenue suits and consolidation proceedings whenever instituted or initiated irrespective of the date of the filing of the writ petition

I now come to sub-s (2) In substance, it says that in spite of the abolition of special appeals by sub-s (1), special appeals which were pending on 17th August, 1972, shall be maintainable It was urged by learned counsel for appellants that sub-s (2) is a saving clause and not a proviso and that it could not be used to extend the scope of the main or operative clause because saving clauses are often added by way of abundant caution Saving clauses are generally put in where

one Act is repealed and re-enacted by another, the scope and purport of both remaining the same. The effect is that the portion of the repealed Act remains in force as if the second Act had not been passed. A saving clause is used to establish an exception from the general nature of a statute, i.e. to restrict a repealing Act. In *Shah Bhuraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha* (1), the Supreme Court has referred with approval to the observations of WOOD, V. C. in *Fitzgerald v. Champneys* (2) that saving clauses are introduced into Acts which repeal others, to safeguard rights which, but for the saving, would be lost. Sub-s. (1) of s. 4 does not repeal any Act and, therefore, sub-s. (2) cannot be said to be a saving clause.

Sub-s. (2) of s. 4 is clearly a proviso to sub-s. (1). In *Commissioner of Commercial Taxes, Board of Revenue, Madras v. Ramkishan Shrikishan Jhaver etc.* (3), the Supreme Court has said.

"We may add that we are not precluded from looking at the proviso in interpreting the main part of the sub-section. We may in this connection refer to the following passage in *Maxwell on Interpretation of Statutes*, Eleventh Ed. at p. 155 where it is observed.

'There is no rule that the first or enacting part is to be construed without reference to the proviso.'

'The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.'

(1) AIR 1961 SC 1596

(2) (1861) 70 E.R. 959.

(3) AIR 1968 S.C. 60.

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'The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together is to prevail'

In *Ishverlal Thakorelal Almaula v Motibhai Nagibhai* (1), the Supreme Court has observed.

"The proper function of a proviso is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso."

LUSH, J in *Mullins v Treasurer of Survey* (2) observed

"When one finds a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso"

Applying these principles to the present case, it appears that, but for sub-s (2), special appeals pending on 17th August, 1972, would also have fallen within the mischief of sub-s (1) and would have stood abolished. Obviously in the cases of pending special appeals the writ petitions must have been filed before s 4 came into force. Sub-s (1), therefore, sought to abolish even such special appeals which arose out of writ petitions filed before s 4 came into force. This shows that sub-s (1) is retrospective and abolishes all special appeals of the classes mentioned therein irrespective of the date of institution or commencement of the revenue

(1) AIR 1966 SC 459

(2) (1880) 5 QBD 170 at p 178

suits or consolidation proceedings and irrespective of the date of filing of the writ petitions

There are two other circumstances which support this conclusion. The statement of objections and reasons for introducing s. 4 says:

“With a view to reducing inconvenience and expense to litigants and delay in final disposal of cases caused by multiplicity of appeals the U P High Court (Abolition of Letters Patent Appeals) Act, 1962 was passed abolishing appeals to the High Court from decisions of a single Judge of that Court in the exercise of appellate jurisdiction in respect of decrees and orders made by subordinate civil courts.”

“It has been felt that cases decided by the revenue courts under the U P Land Revenue Act 1901, or U P Tenancy Act, 1939, or the U P Zamindari Abolition and Land Reforms Act 1950 or by the Director of Consolidation under the Consolidation of Holdings Act, 1953, should be treated similarly inasmuch as the parties concerned have the benefit of going through the hierarchy of revenue courts or consolidation authorities. It is, therefore, proper to abolish the appeals to the High Court from decisions of a single Judge of the Court in exercise of jurisdiction conferred by Arts. 226 and 227 of the Constitution in respect of such cases. With this view it is proposed to amend the U P High Courts (Abolition of Letters Patent Appeals) Act, 1962.”

The object of ss. 3 and 4 of the 1962 Act is to save all litigants from inconvenience and expense of filing special appeals. The object is applicable equally to those litigants who had filed their writ petitions before

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s 4 came into force and to those litigants who filed their writ petitions thereafter. Since the object was to protect the litigants from some evil or abuse, it is legitimate to hold that the intention was to save and protect all such litigants who can be protected. If it is held that the special appeals arising out of writ petitions filed before s 4 came into force, are not abolished, then a large number of litigants will not be saved from the evil or abuse from which the Legislature wanted to save them. Such an interpretation would partly defeat the object of the provision. The object of the provision also points towards its being retrospective in operation.

The language used in s 3 of the U P High Court (Abolition of Letters Patent Appeals) Act, 1962 is similar to the language used in the newly introduced s 4. S 3 reads:

“(1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of this Act, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a court subject to the superintendence of the High Court anything to the contrary contained in cl 10 of the Letters Patent of Her Majesty, dated the 17th March, 1866 read with cl 17 of the U P High Courts (Amalgamation) Order, 1948, or in any law notwithstanding

(2) Notwithstanding anything contained in sub-s (1) all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act shall continue to lie and be heard and disposed of as heretofore as if this Act had not been brought into force.”



There can be no doubt that s 3 is retrospective and abolishes all special appeals arising out of appellate judgments of single Judges even where the right of appeal had become vested. Only special appeals which were pending were saved by sub-s (2). Since the object of ss 3 and 4 is the same and the language used is similar, it is reasonable to infer that the Legislature intended both provisions to be retrospective and to abolish special appeals even where the right to file the special appeals has become vested in the parties.

For the reasons stated above I am of the view that except for special appeals pending on 17th August, 1972, all special appeals arising out of revenue suits or consolidation proceedings, whether the right to file the special appeals had become vested or not in the parties, have been abolished by s 4. The appeal filed by the appellants was, therefore, not maintainable.

The Special Appeal may now be laid before the Bench concerned with my opinion for necessary orders.

*Question answered*

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## APPELLATE CRIMINAL

*Before Mr Justice K N Srivastava and  
Mr Justice P N Bakshi*

STATE OF U P

APPELLANT,

*v*

KAMLA PRASAD AND ANOTHER

RESPONDENTS

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May 21

**Factories Act, 1940, ss 12, 92 and 118—Scheme for disposal of wastes submitted by Factory to Effluent Board—Factory's failure to carry out amendments suggested by the Board—Conviction under s 92—Proper.**

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The power granted to the Effluent Board under sub-r 11 of r 18 authorising it to approve the arrangements which the existing factory has made with regard to its wastes and effluents also carries with it an implied power to reject the arrangement and to issue directions for the making of other specific arrangement which in the opinion of the Effluent Board would be effective

If the directions given by the Effluent Board are not complied with by the respondents they are clearly guilty of an offence punishable under s 92 of the Act

*Jagannath Sharma v State* (1) and *State v Hari Ram Kamari* (2) overruled

Government Appeal No 2700 of 1969 from the order of R N Sinha, IV Civil and Sessions Judge, Gorakhpur in Criminal Appeal No 359 of 1968

G A, for the Appellant

V S Awasthi, for the Respondent

P N BAKSHI, J —The respondents have been convicted for an offence punishable under s 92 of the Factories Act, 1948 for breach of the provisions of s 12 of the said Act read with r 18 of the U P Factories Rules, 1950. They have been awarded a sentence of fine of Rs 250 each and in default to undergo one month's S I

The respondents are occupier and Manager of Diamond Sugar Factory, Pipraich, district Gorakhpur. The factory was in existence on the date of the enforcement of the rules framed under the Act. Under cl 7 of r 18 of the U P Factories Rules, the factory was required to submit to the Effluent Board which was constituted by the State Government, an application detailing the arrangements which were in existence for the disposal of the wastes emanating due to the manufacturing process carried on by the factory, for its approval. It appears that the Effluent Board did not approve this arrangement and made suggestions to

(1) Cr. Rev. No 133 of 1970 dated 30th April, 1971. (2) Cr. Appeal No 41 of 1969 dated 18th July, 1972.

the factory from time to time as to the manner it should disposed of its effluents but the management of the factory did not comply with these suggestions. The Inspector of Factories inspected the premises of the factory on 12th May, 1967. He found that proper arrangement had not been made for the disposal of the effluents from the factory as directed by the Effluent Board. He therefore, filed a complaint on 1st March, 1968 in the court of the District Magistrate, Gorakhpur for taking cognizance of the offence against the accused under s 92 of the Factories Act as aforesaid.

The respondents asserted in their statements that effective arrangements had been made for disposal of the effluents and the Effluent Board had not prescribed any definite plan. It is further asserted that the complaint had been filed under some illusion. The respondents produced Ram Dularey Singh (D W 1) Deputy Chief Engineer of the factory and Chandika Tewari (D W 2) to prove their case. These witnesses deposed that the wastes emanating from the factory was disposed of into a pond, and that the same was being used for irrigating the fields without causing any harm to any one.

The prosecution in support of its case examined Sri Banwari Lal Shukla (P W 1), Inspector of Factories and also filed a series of correspondence between the Inspector of Factories, and the Diamond Sugar Factory vide Exs Ka-1 to Ka-12. Sri Banwari Lal Shukla in his deposition repeated the allegations made in the complaint. From a perusal of the statement and the correspondence referred to above, it is clear that by order of the Effluent Board, the factory was directed to instal a plant for treating the effluents

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flowing out of the factory premises. This order has not complied with by the said factory up to this day. There is no dispute on this point between the parties.

The first class Magistrate, Gorakhpur by his order dated 17th September, 1968 held the respondents guilty of an offence for the breach of s 12 of the Factories Act read with r 18 of the Rules framed thereunder, and convicted the respondents under s 92 of the said Act and imposed a fine of Rs 250 each.

An appeal filed therefrom was allowed by the Sessions Judge, Gorakhpur on 15th September, 1969 on the finding that the arrangements made by the factory for disposal of its wastes and effluents through a Nali did not appear to be ineffective. Aggrieved thereby, the State of U P has filed an appeal in this court under s 417, Cr P C.

Learned counsel for the State has argued that the acquittal of the accused is not warranted in law. He has pointed out to us certain sections of the Factories Act and the Rules made thereunder in support of his submission which we shall presently examine. S 12 of the Factories Act runs thus.

*Disposal of wastes and effluents*—(1) Effective arrangements shall be made in every factory for the disposal of wastes and effluents due to the manufacturing process carried on therein.

(2) The State Government may make rules prescribing the arrangements to be made under sub-s (1) or requiring that the arrangement made in accordance with sub-s (1) shall be approved by such authority as may be prescribed.

Under this section a duty is cast upon every factory to make effective arrangements for disposal of its wastes

id effluents The aforesaid section envisages two procedures for scrutinizing whether the arrangements made by factory are effective or not In the first place, the State Government is authorised to prescribe rules with regard to the arrangements that ought to be made. In the second place, the State Government is authorised to appoint an authority which is empowered to approve of the arrangements made by the factory. It is not disputed that the State Government has not prescribed any rules as required under sub-s. (2) of s 12 It is further not disputed that the State Government has appointed the Effluent Board which is the authority to approve of the arrangements made by the factory Thus in the present case we are not concerned with the powers and jurisdiction of the Effluent Board with regard to the approval or otherwise of the arrangements which a factory makes for disposal of its wastes and effluents It has to be considered whether these arrangements are effective or not.

Coming now to the rules which have been framed under s. 12(2) of the U. P. Factories Act, 1948 it would be pertinent to refer to r 18, sub-r. (1). The Effluent Board is to consist of the following members.

(a) Chairman, who shall be the Director of Medical and Health Services, U. P., Lucknow

(b) Members (Secretary) who shall be the Chief Inspector of Factories, U P, Lucknow.

(c) Eight other members belonging to the Health Department, Engineering Department, Irrigation Department, Agricultural Department, Health Organization Department, Head of General Research Section of the Technological Institute, Kanpur and lastly the Chairman of the Indian Sugar Mills Association, U P Branch.

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It is also provided in sub-r (k) of r 18 that five other members may also be appointed by the State Government

The constitution of the Effluent Board clearly indicates that it comprises of technical hands who are experts not only in the field of public health but the interest of the management is also represented therein. This Effluent Board is to function for a period of two years under sub-r (3) of r 18. Travelling allowance has been permitted under sub-r (4) of r 18. The procedure for meetings is prescribed in sub-r (5) and (6) of r 18. Under sub-r (7) of r 18, it is laid down that:

“Every factory in existence on the date of the enforcement of this rule shall submit to the Board an application along with detailed plans of arrangements proposed to be made, or in existence, in accordance with sub-s (1) of s 12 within 3 months from the date of enforcement of this rule”

It is not disputed that in pursuance of the requirements of sub-r (7) of r 18, the Diamond Sugar Mills applied to the Effluent Board within the time prescribed therein. It appears from the perusal of the record that the arrangements made by the Diamond Sugar Factory were provisionally accepted by the Effluent Board, but by an order dated 31st January, 1966 from the Chief Inspector of Factories, U P this interim arrangement was cancelled. The Diamond Sugar Factory was directed to install a treatment plant for the disposal of its wastes and effluents. The factory was given a number of opportunities to comply with the directions of the Effluent Board with the result that it was decided to prosecute the respondents for non-compliance.

One of the points raised in this appeal is whether the Effluent Board had the power to give directions to the factory to install a treatment plant while disapproving of the arrangements which had been made by the factory as detailed in his application under sub-r (7) of r. 18. For deciding this question is necessary to refer to sub-r. (11) of r 18 which runs thus:

"If the Board approves of the arrangements the plans in duplicate shall be returned to the factory duly signed by the Secretary on behalf of the Board.

It is argued that sub-r (11) of r 18 only authorises the Effluent Board to approve the arrangement but is silent on the question whether it has the power to disapprove the arrangements and issue further instructions. Learned counsel for the respondents has relied upon an unreported decision of Hon'ble B D GUPTA, J in *Jagannath Sharma v State* (1). The following observations of the learned single Judge may be quoted here:

The language in which cl (1) of r 18 is couched is somewhat unfortunate inasmuch as it appears to lay down that if the arrangement made is in accordance with sub-s (1) of s 12, it shall be approved by the Effluent Board. However, construing the provisions in cl (1) as laying down that such arrangements as existed or are proposed, shall be laid before the Effluent Board for its approval and that in case the Board approves the arrangement, the plans shall be returned as contemplated by cl (ii). There is no provision in r 18 as to what would be the position in case the Effluent Board disapproved the existing or proposed arrangements, and I fail to see how any breach of any provision in r 18 is made out by

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(1) Cr Rev No, 138 of 1970 dated 30-4-1971.

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reason of the circumstance merely that the Effluent Board disapproved the arrangements set forward on behalf of the factory in the application made by the factory to the Board under cl (7) of the rule."

The above passage has been quoted with approval by JAGMOHAN LAL, J in *State v Hari Ram Kamani* (1)

We have carefully considered these single judges decisions but in our opinion they do not lay down the correct law. It is an established principle of law that when the Legislature enables something to be done, it gives power at the time by necessary implication to do everything which is indispensable for the purpose of carrying out the purposes in view. Dealing with this doctrine POLLOCK, C B observed in *Fenton v. Hampton* (2).

"It becomes therefore all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus; whenever anything is authorised and especially if, as matter of duty required to be done by law and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something will be supplied by necessary interdiment."

In *Bidi Leaves and Tobacco Merchants Association, Gondia v. State of Bombay* (3), their Lordships of the Supreme Court while dealing with the aforesaid principle of law have observed thus

(1) Govt App No 41 of 1969 decided on 18-7-1972  
(2) (1858) 117 R R 32 at p 41. 11 Moo P C 447  
(3) A.I.R. 1962 S C 486.



"In other words, the doctrine of implied powers can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead letter and cannot be enforced unless a subsidiary power is implied."

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In our opinion, the power granted to the Effluent Board under sub-r (11) of r 18 authorising it to approve the arrangements which the existing factory has made with regard to its wastes and effluents also carries with it an implied power to reject the arrangement and to issue directions for the making of other specific arrangement which in the opinion of the Effluent Board would be effective in the circumstances of each case. If this power is not implied, sub-r (11) of r 18 would become a dead letter incapable of providing any relief for the making of an effective arrangement to safeguard the health and welfare of the workers of the factory. We, therefore, are of opinion that the single Judge decisions referred to above have been wrongly decided and must be overruled.

The next question which has been raised in this case depends upon the interpretation of sub-r (14) of r 18 framed under the Factories Act which runs thus,

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"The Manager, or the occupier of the factory may, within thirty days of the date of the decision of the Board, appeal against it to the State Government whose order shall be final "

Learned counsel for the respondents has argued that use of the words "shall be final" cannot oust the jurisdiction of this court to consider whether the arrangements provided by the factory are effective or not. For this purpose also, reliance has been placed upon the abovementioned single Judge decision; in which the following observations have been made:

"It is true that the necessary inference flowing from the disapproval by the Effluent Board was that in the opinion of the Board the arrangements, which the factory had been resorting to for disposal of its wastes and effluents, was not effective. That however, by itself, appears wholly insufficient to make the court hold that the applicants had not made effective arrangements for the disposal of the wastes and effluents. If the State Government rules prescribing the arrangement to be made, and that arrangement had not been resorted to, a breach of cl (i) of s 12 of the Act may have been involved. In the absence of any such rule by the State Government, the Court has to record its own satisfaction in regard to each case brought before it that the factory concerned had not made effective arrangements for the disposal of wastes and effluents "

We have held above that the Effluent Board is empowered to disapprove of the arrangement made by the factory and also to give further directions as to the manner in which the wastes and effluents of the factory are to be discharged. Under sub-r (14) of r 18 the Manager or the occupier of the factory had been given

a right to file an appeal to the State Government within thirty days and that the order of the State Government shall be final as laid down thereunder. The point for consideration is as to what is the scope of the finality which is mentioned in that sub-section. Finality of orders may be of two types. In one case, it may refer to finality within the provisions of that Act. That is to say once the order has become final because the State Government has decided it under sub-r (14) of r 18 or because no appeal has been preferred by the party, in either case the authorities provided under the Factories Act or the rules framed thereunder have got no power to revise or review the final order passed in accordance with the provisions of these rules. The other type of finality refers to the jurisdiction of the courts to consider the correctness or otherwise of the orders passed under sub-r (14) r 18. It cannot be disputed that such orders as are passed by the Effluent Board can be challenged by civil courts. It is not the intention of the framers of the Factories Act and the rules framed thereunder to oust the jurisdiction of the Civil Courts, in considering the question whether the arrangements made by factory are effective or not. But for that purpose, it is necessary that an action should be launched in the proper forum that is the civil court for challenging those orders. In several enactments we find that the jurisdiction of the civil courts to take cognizance of proceedings arising under that Act are barred; for instance under s 49 of the Consolidation of Holdings Act, no civil suit or proceedings shall lie for challenging the orders passed under that Act. There is no such corresponding provision in the Factories Act. As such, it is evident that this Act does not bar the jurisdiction of the civil courts to consider whether the requirements of s 12 of the Factories Act have been

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complied with or not. In the present case, however, no civil suit has been filed for the purpose of challenging the correctness or otherwise of the orders passed by the Effluent Board. As such to our minds, that matter cannot be gone into in a prosecution under s 92 of the Factories Act. S. 92 of the Factories Act runs as follows:

“92. *General penalty for offences*—Save as is otherwise expressly provided in this Act and subject to the provisions of s 93 if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rule made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term, which may extend to three months or with fine, which may extend to five hundred rupees or with both and if the contravention is continued after conviction, with a further fine which may extend to seventy-five rupees for each day on which the contravention is so continued.”

From a perusal of this section it is clear that the occupier or manager of the factory are liable to commit an offence under the aforesaid section of the Act if they have contravened any rules made thereunder or any order given in writing thereunder.

In the present case, as we have mentioned above, the Effluent Board had passed an order directing the Diamond Sugar Factory to install a treatment plant in the premises for the disposal of its wastes and effluents. This order had become final under the Act as no appeal had been preferred therefrom by the respondents. A disobedience of this order, therefore, is

clearly covered by the provisions of s 92 of the Factories Act

In our opinion, therefore, all that this Court is required to consider in this appeal is whether there is in existence a final order of the Effluent Board which has been contravened by the respondents. There is no dispute that there is such an order which has not been complied with by the respondents. As such, in our opinion the respondents are clearly guilty of an offence punishable under s 92 of the said Act. The observations made in this connection in the unreported decisions referred to above, therefore cannot be unheld for the simple reason that they have failed to consider the import of the words "shall be final" as laid down in r 18, sub-r (12) of the U P Factories Rules, 1950. We are, therefore, of opinion that by contravention of the order of the Effluent Board directing the respondents to set up treatment plant they have committed the breach of s 12 of the Factories Act read with r 18 of the aforesaid Rules punishable under s 92 of the Factories Act.

In the result, therefore, this appeal is allowed. The order of the Sessions Judge dated 15th September, 1969 is set aside and that of the Magistrate dated 17th September, 1968 is restored. The respondents are convicted under s 92 of the Factories Act and sentenced to a fine of Rs 250 each. In default of payment of fine, they shall each undergo simple imprisonment for one month.

*Appeal allowed*

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## APPELLATE CIVIL

Before Mr Justice R. L. Gulati and

Mr Justice C. S P Singh

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PETITIONER,

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**Rules of Court, 1952.** (*Allahabad High Court*), Chap. VIII, r. 5—*Writ petition dismissed in default—Application for restoration also dismissed—The dismissal of writ petition in default is 'Judgment' hence appealable*

The order of dismissal of a writ petition is a judgment within the meaning of that word as used in the Letters Patent and r 5 of Chap VIII of the Rules of the Court, and as such appealable. If the order is of such a nature that the rights or claim of any of the parties are finally denied, the order or decision in question would be a judgment.

Special Appeal No. 662 of 1972 from the judgment and order dated 9th October, 1972 and 1st December, 1972, passed by G. C MATHUR, J. in Civil Miscellaneous Writ Petition No 4448 of 1969

*B. P. Srivastava and Shanti Bhushan*, for the Appellant.

*G. K. Sahai and S. C.*, for the Respondents.

C S P. SINGH, J :—The appellant who was a Superintendent of Police was dismissed by an order dated 17th June, 1969 by the President of India (Ann. XLVI to the writ petition) The petition came up for hearing on 9th October, 1972 and was dismissed in default. Subsequently, an application for setting aside the dismissal in default was made, but that too was dismissed by an order dated 1st December, 1972. The appeal is directed against these two orders. Counsel for the respondents has contended that no appeal lies against

the two orders aforesaid. It is as such necessary to consider as to whether an appeal lies against the orders aforesaid.

Counsel for the appellant has contended that both these orders amount to a judgment and are as such applicable. We propose to consider as to whether the first order, i.e. of 9th October, 1972, by which the petition was dismissed in default amounts to a 'judgment'. The Order of the 9th October, 1972, had the effect of dismissing the writ petition and refusing the relief prayed for and terminating the proceedings in the writ petition, and it is in the light of these circumstances that one has to consider as to whether the order dated 9th October, 1972, amounts to a 'judgment' as contemplated by Letters Patent. We have been referred to a large number of authorities touching the question as to what is judgment under ss 109 and 110, C.P.C. and Arts. 133 and 134 of the Constitution, but as has been held by their Lordships of the Supreme Court in *Radhey Shyam v Shyam Behari* (1), the decisions under these provisions have no bearing on the construction of the word 'judgment' appearing in the Letters Patent. Cl. 10 of the Letters Patent has been considered by their Lordships of the Supreme Court in the case of *State of U P v Dr Vijay Anand Mahraj* (2) and in the case of *Radhey Shyam* already referred to earlier. We propose to refer to these two cases first.

In the case of *State of U P v Dr Vijay Anand Mah* (2) an order of assessment made by an Additional Collector under the U P Agricultural Income Tax Act 1948 was quashed by a writ issued under Art 226 of the Constitution on the ground that the assessment was without jurisdiction. Subsequently, assessments

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(2) AIR 1968 S.C. 946

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made by Additional Collector were validated by Ordinance II of 1956 which was replaced by Act No. XIV of 1956 with retrospective effect. The Act, also made provision for a review being made in cases where the assessment had been set aside on the ground of want of jurisdiction. An application was made by the State of U P for review. This application was dismissed by a learned single Judge of this Court on the ground that U P Act No. XIV of 1956 did not apply to proceedings under Art 226 of the Constitution. An appeal against this order was taken to a Division Bench but was dismissed on the ground that the order dismissing the review application was not a judgment within the meaning of Chap VIII, r 5 of the Rules of the Court, and further that the provision for review did not apply to proceedings under Art 226 of the Constitution. One of the questions canvassed before the Supreme Court was to whether the order of the learned single Judge dismissing the review application was 'a judgment'. Their Lordships of the Supreme Court referred to the cleavage of opinions in the various High Courts as regards the meaning to be given to the word 'judgment' appearing in the Letters Patent. The Madras High Court had given a wider meaning to that word than that given by the Calcutta and Nagpur High Courts. Their Lordships did not think it necessary to reconcile the decision of the various High Courts and held that even on the narrower meaning given to that word by the Calcutta and Nagpur Courts, the decision would still be 'a judgment'. Their Lordships held that inasmuch as the decision of the learned single Judge dismissing the application for review denied the right of the State alleged to have been conferred under the Amending Act, it was 'a judgment' within the meaning of cl 10 of Letters Patent. In *Radhey Shyam v Shyam Behari Singh* (1) an objection under O XXI,

(1) A.I.R. 1971 S.C. 2887



1. 90 of the Civil Procedure Code was dismissed by the executive court. Thereafter, an appeal was filed in the High Court. A learned single Judge of this Court allowed the appeal. Against that decision, respondents filed a Letters Patent Appeal under cl 10, and 15, Chap VIII of the Rules of the Court. An objection was taken to the maintainability of the appeal on the ground that the order of the learned single Judge did not amount to a judgment within the meaning of cl 10 of Letters Patent and was not as such appealable. The Division Bench overruled this contention following the Full Bench decision of this Court in *Standard Glass Beads Factory v Shru Dhar* (1). The matter was thereafter taken up in appeal before the Supreme Court. The Supreme Court noticed the decisions of various High Courts including that of this Court, but did not express any opinion as to which of the High Courts had expressed the correct view in the matter. It held that an application under O XXI, r 90, C P C, decided either way affects the rights of the auction purchaser and also of the person who makes such an application, and an order in these proceedings is 'a judgment' inasmuch as the proceedings raise a controversy between the parties affecting their valuable rights and the order allowing an application deprives the purchaser of the right accrued to him as a result of the auction sale. The principle that emerges from these two decisions is that before an order can be said to be a judgment under the Letters Patent, it must affect the parties either by granting or refusing the particular relief claimed for in the proceedings. In the present case the order dismissing the petition in default had the effect of denying the substantive relief claimed in the petition viz that of quashing the order of dismissal. This being so, the order in question is a judgment

(1) AIR 1960 All 692.

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within the meaning of that word as used in the Letters Patent and r. 5, Chap VIII of the Rules of the Court, and is as such appealable. Counsel for the respondents has urged that even though the order in question disposed of the petition with the result that the reliefs prayed for in the petition were denied, the order is not 'a judgment' as there has been no decision on merits. We are unable to accept this contention. There is nothing in r. 5, Chap VIII of the Rules of the Court or cl. 10 of the Letters Patent which suggests that before a particular order or decision can be said to be 'a judgment' it must be based on the merits of the controversy. We are of the view that if the order is of such a nature that the rights or claim of any of the parties are finally denied, the order or decision in question would be a judgment and hence appealable. In the present case, it has been seen that the appellant's challenge to the order of dismissal came to an end with the dismissal of the writ petition, and the contention of the respondents that the order in question was valid remained intact, and that being so, we have no hesitation in holding that the order was appealable. Counsel, as has been noticed earlier, referred to a large number of decisions concerning the interpretation of the word 'judgment' in cases arising under the Code of Civil Procedure and Art. 133 of the Constitution. It is, however, not necessary to refer to these cases in view of the decision of the Supreme Court in *Raddhey Shyam v. Shyam Behari Singh* (1). The question that now arises is as to whether the order dismissing the petition in default was justified. On the date when the case came up for hearing, Mr. B. P. Srinastava, who appeared for the appellant had sent an illness slip. Sri K. L. Misra the other counsel who appeared in the case was no longer instructed in the matter. It appears

that information was given to the court that some other senior counsel was engaged but was not available on that date. From the record, it appears that no vakalat-nama or appearance slip on behalf of the senior counsel had been filed on that date. The result was that Mr. *B P Srivastava* was the only counsel appearing for the petitioner and he was ill on that date. This being so, it would have been advisable for the learned single Judge to adjourn the case instead of dismissing it in default. We are thus of the view that the order dismissing the petition in default was not justified and as such has to be set aside. In this view of the matter it becomes unnecessary to consider as to whether the order dated 1st December, 1972 is a judgment.

The question then arises as to whether the matter should be remanded to the learned single Judge or the petition should be decided by us. The petitioner was suspended as far back as 6th February, 1961, and the order of dismissal was passed on the 17th June, 1969, and the petition in this Court was filed shortly thereafter in 1969. The record of the petition is complete and considering the lengthy proceedings that have taken place in this case, we think it advisable to decide the petition instead of remanding the matter to the learned single Judge.

Coming now to merits of the controversy, counsel for the petitioner has firstly urged that the order of suspension is bad on account of the fact that it was passed before disciplinary proceedings were initiated against him; and secondly that the order in question was vitiated on account of the fact that it has been passed at the instance of the Chief Minister Chaudhry Charan Singh; and thirdly that it is in violation of the principles of natural justice. We propose to examine these contentions *seriatim*.

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An order of suspension against the petitioner could have been passed only in case disciplinary proceedings had already been initiated against the officer concerned. In the present case, the suspension order was passed on 6th February, 1961 (Ann "1" to the petition). By a letter of 26th June, 1961, the State Government informed the petitioner that disciplinary proceedings under r 5 of All India Services (Disciplinary and Appeal) Rules, 1955 had not yet been initiated against him. The Supreme Court, in the case of *P P Nayak v Union of India* (1) has held in a case arising under the All India Services (Disciplinary and Appeal) Rules, 1959 the provisions of which are in *pari materia* so far as the provision relating to suspension is concerned with the rules governing the case of the petitioner, that, initiation of disciplinary proceedings is a condition of precedent to the passing of a suspension order. The suspension order as such passed on 6th January, 1961 was invalid. Counsel for the respondents has, however, urged that even if the order in question was invalid, the order should not be quashed and no order directing payment of salary for the period of suspension should be made in favour of the petitioner, inasmuch as the challenge to the order of suspension is belated and secondly that the suspension order having lapsed after the order of dismissal, the order does not exist in the eye of law, and as a consequence, no order for payment of salary can be made in favour of the petitioner. In respect of the second contention, counsel for the respondents has placed reliance on a decision of the Supreme Court in *Om Prakash Gupta v State of U P* (2). It is not necessary for us to consider as to whether in the present case the order of suspension can be said to be non-existent in the eye of law, so as to prevent it from being quashed by issue of suitable

(1) AIR 1972 SC 554

(2) AIR 1955 SC 680

writ, or even if it has lapsed, the court is powerless to direct payment of salary to the petitioner, for we are of the view that the petitioner is guilty of laches so far as challenge to this order is concerned. The petitioner was clearly intimated by the letter of 26th June, 1961 (Ann "VI" to the petition) that no disciplinary proceedings under the Services Rule of 1955 had been initiated against him. This being so, the petitioner should have challenged the suspension order soon thereafter. Instead of doing so, he waited for the dismissal order and has sought to challenge the order in 1969. Even if the petitioner were to file a suit to challenge the order of suspension, it would be barred by limitation and we see no jurisdiction for condoning the delay as no valid explanation has been offered for this delay. We accordingly decline to interfere with the order of suspension at the instance of the petitioner.

Coming now to the contention that the order of dismissal is vitiated on account of *mala fides* of the then Chief Minister Chaudhari Charan Singh, we are of the view that this contention must also be rejected. An enquiry into the charges levelled against the petitioner was made by a body which did not consist of the Chief Minister, and ultimately the order of dismissal was passed by the President of India. It has not been established that either the enquiring members or the President of India were influenced by Chaudhari Charan Singh, the then Chief Minister, against whom there are imputations of *mala fides*. In the circumstances, it cannot be said that the order of dismissal is vitiated on account of any illwill or grudge which Chaudhary Charan Singh bore against the petitioner. This being so, the dismissal order cannot be struck down on this score. This apart, the allegations made against Chaudhari Charan Singh have been controverted by an affi-

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davit filed by him. Initially Chaudhari Charan Singh had not filed any affidavit controverting the allegations of *mala fide* made against him. They had been controverted by an affidavit filed by an officer of the State Government. Subsequently, during the hearing of the appeal, an affidavit was filed by Chaudhari Charan Singh. Counsel for the petitioner objected to the affidavit being brought on the record at this stage. We, however, think that it would be in the ends of justice to bring the affidavit on the record, and not to allow the petitioner to take advantage of the technical plea that the allegations of *mala fide* had not been controverted by the person against whom they have been made. We are satisfied on a perusal of the affidavit filed by Chaudhari Charan Singh that the petitioner has not satisfactorily established the allegations of *mala fide* made against him. The second contention must, therefore, fail.

We now turn to the main contention in the case, that the order of dismissal has been passed in breach of the principles of natural justice. Counsel for the petitioner has contended that the petitioner made a request for inspection of documents set out in Ann. "XXV" to the petition, before filing of the written statement on the ground that it would not be possible for the petitioner to prepare his written statement satisfactorily in the absence of documents, but in spite of repeated request inspection of only some of the documents were allowed, while other documents set out in Anns "XXVIII" and "XXIX" were not made available to him with the result that a full and complete written statement could not be filed by the petitioner. A perusal of Anns "XXVIII" and "XXIX" clearly reveals that the petitioner was fully cognizant of the contents of these documents as also the purpose for which he would be utilising them. A written state-

ment filed by a party is for the purpose of controverting the allegations made against him in the disciplinary proceedings, and need not set out the evidence in support of the written statement. The written statement of the petitioner has been filed as Ann "XXX" to the petition, and runs into as many as 346 pages along with the annexures. A perusal of the written statement shows that the petitioner was in no way prejudiced in the submission of his written statement, by inspection of the documents claimed by him not having been allowed at the stage of the filing of the written statement. This contention also loses force on account of the fact that as we have already noticed earlier, the petitioner was fully cognizant of the contents of the documents of which the inspection has been sought by him at the stage of the filing of the written statement. It, as such cannot be said that the petitioner was prejudiced in making his defence on account of certain documents not having been made available to him for inspection at the stage of the filing of the written statement. It is then contended that the documents set out in Ann "XXXIX" to the petition were suppressed and not produced before the Board of enquiry, though they were summoned by the petitioner for his defence by an application dated 19th August, 1967 and this in any event seriously handicapped the petitioner in his defence. As many as 64 documents have been set out in Ann "XXXIX" in respect of which the allegations are that they were not produced before the Board of enquiry. Before we consider the question as to whether there has been any omission as alleged and the question whether there was any justification on the part of the prosecuting agency for not making the documents available to the petitioner it would be worthwhile to refer to the charges on the

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basis of which the order of dismissal came to be passed, for there are a large number of documents referred to in Ann "XXXIX" relating to charges in respect of which the petitioner has been exonerated. The Commission, held that only charges 1 and 6 have been fully proved and charge no 8 had been partly proved against the petitioner. These charges are as under

"Charge no 1—You, Sri K N Dikshita, Superintendent of Police, under suspension while posted as Superintendent of Police, Bulandshahr, from 4th March, 1958 to 25th April, 1960 abused your official position by extorting Rs 5,000 as illegal gratification on 13th July, 1958, at your residence at Bulandshahr from Sub-Inspector Sri M C Tyagi, serving under you, and so are hereby charged with misconduct in the discharge of your duty and for not maintaining absolute integrity and devotion to your duty as enjoined in r 3 of the All India Services (Conduct) Rules 1954

*Statement of Allegations of Charge No 1*

1 During the tenure of posting of Sri K N Dikshita as Superintendent of Police, Bulandshahr, proceedings under s 7, Police Act were started against S-I Sri M C Tyagi for his failure to register two burglary cases committed in July and August 1957, in Police Circle Debai, where he was a Station Officer. Sri N U Ansari, Deputy Superintendent of Police was deputed as Enquiring Officer. During the course of departmental proceedings Sub-Inspector Sri M C Tyagi was called by Sri K N Dikshita at his residence on 6th July, 1958 and asked to pay Rs 10,000 to him as bribe. The Sub-Inspector ultimately paid Rs 5 000 to Sri Dikshita on 13th July, 1958



2 Sri N U Ansari, Deputy Superintendent of Police who had recommended the reduction of the Sub-Inspector was influenced by Sri K. N. Dikshita to change the findings and exonerate the Sub-Inspector, Sri K N Dikshita thus abused his official position and interfered with the discretion of Sri N U Ansari, Deputy Superintendent of Police

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*Charge no 6*—You, Sri K N Dikshita, Superintendent of Police, under suspension, while posted as Superintendent of Police, Bulandshahr, from 4th March, 1959 to 25th April, 1960 dishonestly and maliciously caused the removal and disappearance of the original casualty and increment registers relating to Sub-Inspector Sri M C Tyagi on or about June 1959, or afterwards and further dishonestly caused to be made interpolations and obliterations in the entries in Government records, namely, the service book and character roll of S I Sri M C Tyagi, H O B and Punishment Index Register in that

(a) In the Service Book of S I Sri M C Tyagi regarding crossing of his efficiency bar and raising of pay to Rs 190 per month which had the initials of S I was erased and instead an entry about withholding his integrity certificate was substituted and figure '9' of 1958 was converted to figure '8' to make it read as 1958,

(b) In the Character Roll of S I Sri M C Tyagi, misconduct entry no 37/ST(C)-58, dated 18th October, 1958, and misconduct entry vide H O B no 943, dated 16th November 1958 were subsequently inserted

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(c) In the H O B Register entry dated 27th January, 1959, order number 66, at serial no 53, regarding increment allowed to S I Sri M C Tyagi was obliterated with ink so as to make it illegible,

(d) In the H O B Register pages were changed and order no 943, dated 16th November, 1958 regarding withholding of increment of S I Sri M C Tyagi was introduced,

(e) In the Index Register of punishment file, pages were removed and fresh entries made incorporating the punishment of S I Sri M C Tyagi which did not exist earlier and to that end, file covers of various punishment files were also changed;

and this you did with the object of awarding misconduct entry to the said S I and withholding his integrity certificate on a back date by your no 37/ST(C)-58, dated 18th October, 1958 and so are hereby charged with misconduct in the discharge of your duty and for not maintaining absolute integrity and devotion to your duty as enjoined in r 3 of the All-India Services (Conduct) Rules, 1954

*Statement of Allegation of Charge no 6*

1 During the tenure of posting of Sri K N Dixitha as Superintendent of Police, Bulandshahr, he reprimanded Sub-Inspector Sri M C Tyagi for leakage of payment of Rs 5,000 made to him by the Sub-Inspector (Charge no 1 refers) The Superintendent of Police gave a charge-sheet under s 7 Police Act, to the Sub-Inspector on 30th May, 1959 in connection with the strictures passed

against the Sub-Inspector by the Additional Sessions Judge, Bulandshahr, in a case under s. 399/402, I P C of P S Debal, although a show cause notice for an adverse entry had been given to him previously by Sri K N Dikshita in the same case and the explanation of the Sub-Inspector to the show cause notice had also been received. Departmental proceedings under s 7, Police Act, were transferred by D I G Police, Meerut Range, to S P, Tehri, Garhwal on the representation of the Sub-Inspector

2. Sub-Inspector Sri M C Tyagi had, in the mean time, been allowed to cross his efficiency bar increment from Rs 180 to Rs 190 per month from 9th February, 1959, vide entry in the order book dated 27th January, 1959 and in the Service Book. The entry in the Service Book was later got erased and the entry in the order book was obliterated. Another entry was inserted in the Service Book in back date over the erased portion about the withholding of integrity certificate of S. I. Sri M C Tyagi which was initialled by Sri K N. Dikshita. The obliterated entry has been deciphered by the Handwriting Expert and goes to prove that increment had been allowed to the Sub-Inspector. Since no entry could be inserted in the back date in order book regarding withholding of the integrity certificate of the Sub-Inspector, H. O B was tampered with at the instance of Sri K. N. Dikshit. Pages of Order Book were changed and now pages adding the entry about the withholding of integrity certificate of S I Sri M C Tyagi were inserted. Increment and Casualty Registers and Punishment File Index were got tampered with by Sri K. N

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Dikshita Sri K. N. Dikshita, on receipt of a reminder from Dy. I. G. Police, Administration wrongly reported to him on 24th June, 1959 that he had intimated to the D I G., Administration on 18th October, 1958 about the award of a misconduct entry and withholding of integrity certificate of S I. Sri M. C Tyagi. No such letter exists in the file of the Superintendent of Police and was never received in the office of the D. I. G., Administration. This he did after affecting forgeries and interpolations in the records

*Charge no 8*—You, Sri Dikshita, Superintendent of Police, under suspension while posted as Superintendent of Police, Bulandshahr from 4th March, 1956 to 25th April, 1960, abused your official position by ordering unauthorised checking of the General Diary of Police Station Kotwali by your Stenographer Sri S. R Gupta, on 24th September, 1958 at about 13 25 hours and further with ulterior motive, caused the time of the checking of the General Diary Report written by your Stenographer, Sri S R Gupta changed from 13 25 hours to that of 03 25 hours and ultimately failed to take action against the defaulting officers and so are hereby charged with misconduct in the discharge of your duty and for not maintaining absolute integrity and devotion to your duty as enjoined in r 3 of the All India Services (Conduct) Rules, 1954

*Statement of Allegation of charge no 8*

During the tenure of posting of Sri K. N. Dikshita, as Superintendent of Police, Bulandshahr, Sub-Inspector Sri Mohar Singh, Station Officer, Kotwali, Bulandshahr, supplied Desehri mangoes worth Rs 80 and Dehra Dun rice worth Rs 100 to

Sri Dikshita and when the S. I. approached Sri Dikshita for payment, Sri Dikshita was annoyed. He subsequently sent his Stenographer, Sri S. R. Gupta, with an ulterior motive, on 24th September, 1958, at about 13 25 hours to make an unauthorised checking of the General Diary of P. S. Kotwali with a view to entrap the Station Officer. He got a report written in the General Diary by his Stenographer because it was not running in time. When Sub-Inspector Sri Mohar Singh approached Sri Dikshita at his residence, he did not at first return the General Diary and called him again the next morning. When the Sub-Inspector came next morning, S. P. returned the General Diary after causing interpolation in the time of G. D. Report from 13 25 hours to 03.25 hours to mitigate the gravity of the charge. Sri Dikshita also failed to take appropriate action against Station Officer, Kotwali, in this connection when the Sub-Inspector agreed not to take payment of the cost of rice and mangoes earlier supplied by him to Sri Dikshita."

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In respect of charge no 8 the Commission recorded a finding that inasmuch as the first part of charge rests on the statement of Sri Mohar Singh, and there being other infirmities in the evidence of the prosecution, the first part of charge no 8 had not been proved and it was only the second part that was proved. Now the documents which are in respect of charges 1, 6 and 8 are mentioned in Ann "XXXIX" to the petition at serial nos 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 17, 18, 19, 21, 22, 23, 24, 25, 28, 29, 30, 31, 33, 34, 35 and 38. As there was serious controversy between the parties as to whether these documents had been made available to the petitioner, we had the record of the case

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summoned and thereafter counsel for the respondents after a perusal of the record filed a list of the documents filed before the enquiry board, as also an affidavit dated 12th March, 1973. Reference was also made to the original files produced before the enquiry board by counsel for the respondents, in order to show that the documents asked for by the petitioner were either made available to him, or had been filed before the enquiry board, and the petitioner had been afforded an opportunity of inspecting these documents, but chose not to exhibit the documents in support of his case. Counsel for the respondents, has also in the alternative, urged that inasmuch as the documents set out in Ann 'XXXIX' to the petition were relevant only for the purposes of shaking the credit of the witnesses produced in support of the prosecution, and as the petitioner knew of the contents of most of the documents, he ought to have cross-examined the witnesses with reference to the facts which the documents if produced, would have proved, but as no such attempt was made by the petitioner it cannot be said that the defence was prejudiced in any manner whatsoever by the documents not having been made available to the petitioner. We are inclined to agree with the contention raised on behalf of the respondents.

We now propose to consider the contention of the petitioner based on Ann 'XXXIX' to the petition. Items 1, 2, 3 and 4 of Ann 'XXXIX' are general diary, extracts of police station Debai of 4th February, 1958, 3rd March, 1958, 4th March, 1958 and 12th April, 1958. So far as item no 3 is concerned, which is the general diary of police station Debai of 4th March, 1958, this was filed as a defence exhibit, being Ex. D-10. We are then left with items nos. 1, 2 and 4. The purpose for which items nos. 1 and 2 were to be used is stated in Ann "XXXIX" to prove that Sub-Inspec-

tor Tyagi, who was alleged to have bribed the petitioner, was in the habit of writing Peshbandi reports against police officers and members of the public who could possibly harm him. In para 9 of the supplementary counter-affidavit filed on 12th March, 1973, it is stated that these general diaries could not be produced as they had been weeded out. It is further averred that the petitioner filed attested copies of these extracts and as such this material was before the enquiry board. In para 7 of the supplementary rejoinder-affidavit, it is averred that inasmuch as the enquiry board did not accept these copies of general diaries, they were not treated as part of the record. The same is the position in respect of item no. 4, which is the general diary of police station Debari of 12th April, 1958. In support of this, it is asserted that this would have proved that S. I. Tyagi had made an entry in the general diary on the eve of his transfer to Bisiakh that the Police Department had been let down and insulted by the transfer and proved the annoyance of Tyagi towards Dikshita. It appears that Tyagi was cross-examined in respect of these general diaries. He admitted entries of 4th March 1958, and in respect of others, he stated that he did not recollect them. We see no reason to disbelieve the statement in the supplementary counter affidavit that these documents had been weeded out. Even assuming that they were intentionally suppressed by the prosecution, we do not see how the mere non-production of these documents prejudiced the defence. As has been seen, the purpose of producing these general diary entries was to show that SubInspector Tyagi was not an independent witness and bore animosity towards the petitioner. So far as this fact is concerned, this was amply clear from other materials which were already before the enquiry board and as would appear from the report of the en-

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quiry board, the tribunal itself was aware of this. There was other evidence on the record which clearly went to show that the relation between Sub-Inspector Tyagi and the petitioner were not cordial. This being so, it cannot in the circumstances be said that the petitioner was prejudiced in his defence by the non-production of these general diary entries. By item no 5 of Ann "XXXIX", the petitioner wanted the entire record of the punishment and appeal file of Tyagi with the petitioner's comment on the three cases against Sub-Inspector Tyagi. The purpose of producing this record according to the petitioner was to show the annoyance of the Sub-Inspector with the petitioner and also the true character of the Sub-Inspector and the improbability in the allegation that the petitioner took bribe from Tyagi. So far as this is concerned, the entire file had been filed as Anns P-32 and P-33. The petitioner, however, complains that only some documents viz Exs P-32 and P-33 were exhibited by the prosecution out of this file and the remaining were not exhibited. The entire punishment and appeal file of Sri M. C. Tyagi was produced before us out of which the prosecution chose to exhibit some of the documents contained in the file. This should not have prevented the petitioner from exhibiting such other documents, in the file which supported his case. The petitioner, however, took no such steps and as such the contention based on item no 5 of Ann "XXXIX" is also baseless. Item nos 6, 7, 8, 9 and 10 of Ann "XXXIX" are stated in para 12 of the supplementary counter-affidavit of the 12th March, 1973 to be documents which have already been weeded out. In para 9 of the supplementary rejoinder-affidavit, it is stated that the documents at serial numbers 9 and 10 were not weeded out as is clear from the letter of 24th November, 1965. We, however, see no reason to disbelieve the allegation made



in para. 12 of the supplementary counter-affidavit, and as such the contention based on this score must be rejected, for the prosecuting agency cannot be expected to produce documents which no longer exist. Item no 14 of Ann "XXXIX" is a D O. letter dated 6th June, 1960 from the petitioner to Sri M C Sharma. The purpose for which this letter was sought to be produced was for providing the annoyance of P W Tandon with the petitioner. This letter has been filed before the enquiry board as Ex. P-60. Item nos 15, 16 and 17 which were said to be suppressed are in fact contained in the file containing the correspondence with the Police administration and Deputy Inspector General of Police, Meerut Range regarding opening the history sheet of Kalyan Singh. This file was made available to the enquiry board, and in fact it appears that the petitioner himself had filed it as Ex D-21. This contention must also, therefore, fail.

So far as item no 18 is concerned, that is a letter of 6th June, 1958 from the petitioner to Dy I G Police, Meerut Range and was sought to be produced for the purpose of proving the presence of intrigues in Police Lines. This letter is stated in para 15 of the supplementary counter-affidavit to have been weeded out. This fact has been denied in para 12 of the rejoinder-affidavit. In the first place, we see no reason to disbelieve the statement made in para 12 of the counter-affidavit, and in the second place, we do not see how the non-production of this letter had any substantial repercussion on the defence case. So far as items nos 21, 22, 23, 29, 30, 33, 34, 35 and 38 of Ann "XXXIX" are concerned, it has been averred in para 15 of the supplementary counter-affidavit that they have been weeded out. This fact has not been accepted by the petitioner, as is clear from the averment made in para.

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12 of the supplementary rejoinder-affidavit. We again see no reason for disbelieving the prosecution contention that these records have been weeded out. The reason why we place no reliance on the allegations made in the supplementary counter-affidavit is that the prosecution would not have gained anything by the suppression of these documents, for even if the petitioner had produced the documents serialized at these items, we do not see how it would have substantially eroded the prosecution case regarding charges nos 1 and 6, for which most of these documents were relevant. The fact sought to be proved by these documents was of such a general nature that it would have hardly helped the petitioner, even in case the documents were available. This apart, as we have already indicated earlier that a perusal of Ann "XXXIX" shows that the petitioner was fully aware of the contents of these documents, and this being so, he should have cross examined the witnesses, whose veracity he sought to discredit by the production of these documents. Nothing has been brought to our notice to show that the petitioner cross-examined the witness whose testimony could possibly be affected by the production of these documents, in respect of facts alleged to be contained in these various letters. In the circumstances, we do not see how the petitioner has been prejudiced on account of non-production of the documents mentioned at the above items.

So far as item no 19 is concerned, that is said to be a D O letter dated 21st May, 1958 from the petitioner to Police Headquarters, Allahabad and the petitioner sought to produce these documents so as to prove that he had made report against Sri B N Sharma, Head Clerk and for that reason Sri B N Sharma was annoyed with him. In para 16 of the supplementary

counter-affidavit, it is stated that this document was not available. No reason at all has been given why this document was not made available to the petitioner. The case of the prosecution is that this document has been weeded out and as such the prosecution could not have made this document available to the petitioner. It is, however, urged on behalf of the counsel for the respondents that no questions were put to Sri B N Sharma when he appeared as a prosecution witness regarding this fact. Now so far as B. N. Sharma is concerned, he would be annoyed with the petitioner only in case he knew that the petitioner had sent a letter against him to the Police Headquarters. If this fact was, however, not in his knowledge, the question of his being annoyed with the petitioner on this score does not arise. In these circumstances, it was incumbent upon the petitioner to have cross-examined Sri B N Sharma in order to ascertain whether he knew of the communication made by the petitioner to the Police Headquarters. This not having been done, even if the document in question was not made available to the petitioner, it cannot be said that the petitioner was prejudiced in his defence by not being able to challenge the impartiality of Sri B N Sharma, because of the documents not having been made available to him.

So far as documents mentioned at item nos. 24 and 25 are concerned, they are relevant for charge no. 8. These documents were sent to the board of enquiry along with the letter of 3rd December, 1965 Ann. "4" to the supplementary counter-affidavit of the 12th March, 1973 and the same are contained in file no. A/4/19. These documents were available to the board, and it was incumbent on the petitioner to inspect these files and to exhibit such documents that

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would support his defence. Counsel for the petitioner has, however, urged that the petitioner was not aware that these files were with the enquiry board, and in any event, since the record of the case was voluminous, it was incumbent on the prosecuting agency to inform the petitioner about the documents which had been submitted by them to the enquiry board, and this not having been done, the petitioner could not know as to which documents had been received by the enquiry board. We are not impressed by these contentions. So far as the documents which are set out in Ann XXXIX are concerned, they were the documents which the petitioner wanted to produce in his defence. The prosecution having made the documents available to the enquiry board, and there being no impediment in the way of the petitioner to inspect the record filed before the enquiry board, the petitioner should have been vigilant and taken steps to inspect the record from time to time, which was or had become available before the enquiry board during the course of the trial. Thus the grievance about items nos 24 and 25 is also not genuine.

So far as item no 28 is concerned, that too was filed before the enquiry board, as it would appear from the list filed by the respondents. Item no 28 is item no. 12(1) of List A, Category IV, which is a list of the documents filed by the prosecution and the defence of the documents otherwise sent to the tribunal. It appears that the petitioner did not take any steps to exhibit these documents and as such the contention in respect of these documents must also be rejected. Item no 31 was also filed before the tribunal and is item no 12(3) of List A, Category IV documents. So is the case with item no 32 which is item no 12(4) of List A, Category IV documents. This resume clearly

shows that so far as the various documents which have been set out in Ann "XXXIX" are concerned, some of them had been filed and made exhibits. Some had been sent by the prosecution to the enquiry board, but the petitioner did not take care to inspect the record and to find out whether the documents had been sent by the prosecution to the enquiry board as desired by him, and subsequently also no attempt was made to exhibit those documents as defence exhibits. So far as other documents are concerned, they were weeded out and it was not possible for the prosecution to produce them. In respect of the remaining documents, which were not made available to the petitioner, even though the petitioner was aware of the contents of the documents, no questions were put to the witnesses on behalf of the prosecution, whose testimony the petitioner wanted to shake by reference to the documents.

Before we part with this contention of the petitioner, it is necessary to refer to a decision of Supreme Court, on which considerable reliance has been placed by the petitioner. That being in the case of *State of Madhya Pradesh v Chintaman Sadashiva Waishanpayan* (1). It has been contended on the strength of this decision that the fact that certain files were not made available to the petitioner vitiates the entire enquiry. In *Chintaman's* case (1), the petitioner had summoned a particular file, which if made available would have weakened the prosecution case to a very great extent. The High Court had held that non-production of that file amounted to denial of reasonable opportunity to the petitioner. The Supreme Court agreed with this view of the High Court. The position in the present case is, however, different. We have already held that as a majority of the documents which are enumerated in Ann "XXXIX" to the petition had been weeded out,

(1) AIR 1961 SC 1023

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it was not within the power of the prosecuting agency to produce them, and secondly that some of the documents were already contained in the files which was sent to the enquiry board, but the petitioner did not care to inspect the record or produce such document from the files which he thought would substantiate his defence. In respect of some documents which are very few in number which were not made available to the petitioner, we have held that even if they were produced, they would not have any substantial effect on the fate of the case. This being so, the decision in *Chintaman's* case (1) is of no avail to the petitioner. It is necessary to notice one further contention in this behalf made by the counsel for the petitioner. It has been urged that the allegations made by the respondents that certain documents have been weeded out should not be accepted inasmuch as a register of documents which are weeded out has to be maintained in view of para 51 of the office Manual for Superintendent of Police and no such register was produced by the prosecution to prove this fact. The mere non-production of the register of documents weeded out cannot automatically lead one to the conclusion that the documents had been purposely suppressed by the prosecution. In the present case, it was incumbent on the petitioner in case he wanted to challenge this stand taken up by the prosecution that the documents had been weeded out, to have summoned the register of weeded out documents from the official who maintained it or was in custody of such a register. It is *not* suggested that the petitioner took any such step. This being so, we cannot throw out the averments made in the counter-affidavit that certain documents have been weeded out on account of mere non-production of weeded out documents. The contention of the petitioner that the defence was prejudiced on account of non-production

(1) AIR 1961 SC 1629

of documents serialized in Ann "XXXIX" has to be rejected.

Counsel for the petitioner then contends that the prosecution produced documentary evidence which was not mentioned in the charge-sheet, and had that evidence proved by witnesses when they appeared before the enquiry board and this greatly prejudiced the petitioner in his defence. Our attention was invited to an application dated 21st January, 1965 moved by the petitioner before the board of enquiry alleging that the prosecution had been producing documentary evidence not cited in the charge-sheet, and a request was made that such documents should not be accepted in evidence. This application is filed as Ann. 'XXXIV' to the petition. An order on this application was passed on 21st January, 1965 (Ann "XXXV" to the petition). That order may be quoted.

"The application dated 21st January, 1965 moved on behalf of Sri K. N. Dikshita was considered. The learned counsel for Sri Dikshita has no objection to the production of documents which were mentioned at the last hearing and which Board decided to summon. In future the procedure would be that generally speaking only those documents which have so far been cited in the Memo of Evidence will be produced. In case at any stage the State considers it necessary to supplement the documents already cited, they will move an application to do so stating clearly why it was not possible for them to cite that particular document at an early date. If any objection is to be made on behalf of Sri K. N. Dikshita, he would be at liberty to do so. If, however, the Board of Inquiry considers it necessary at any stage

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to summon a document, it will be entitled to do so."

Now, it has not been shown to us, as to whether the petitioner objected to the production of fresh documents at any point of time earlier than 21st January, 1965. This being so, it cannot be said that the petitioner was prejudiced by the production of documents earlier than 21st January, 1965. The principle that the prosecuting agency should not be permitted to rely on documents which have not been referred to in the charge-sheet is based on the supposition that if such a course is allowed to be adopted, the delinquent officer would be taken by surprise. If, however, the officer concerned does not object to such a procedure, it cannot be said that the petitioner was prejudiced in his defence by the production of such document. In the present case, we have already noticed that it has not been established that the petitioner objected to this procedure before 21st January, 1965. This may be due to the fact that either the documents produced were of such nature as the petitioner thought they would not substantially help the prosecution or weaken his defence or were such, in respect of which he was in a position to cross-examine the witness proving them, without having recourse to the other documents which he might have wanted to produce in rebuttal. Thus the petitioner can have no grievance against such documents as have been produced by 21st January, 1965. Ann "XXXVII" to the writ petition contains a list of documents which are said to have been proved by witnesses during examination-in-chief and inspection thereof was not given to the petitioner. Exs P-19, P-23, P-33, P-28, P-31, P-43, P-44, P-45, P-46, P-49 were filed by 21st January, 1965 and as such the contention of the petitioner of any prejudice being caused



to him by the production of these documents during examination-in-chief of the witnesses cannot be upheld. Some documents, mentioned in Ann "XXXVII" relate to charges in respect of which the petitioner has been exonerated and it is as such not necessary to refer to them. We are then left with Exs P-47, P-28, P-31, P-43, P-44, P-45, P-50, P-51, P-52, P-53, P-54, P-57, P-97, P-98 and P-99. We have already extracted the order of Board of Enquiry of 21st January, 1965. In view of this order, these documents could have been produced by the prosecution only after moving an application before the board of enquiry, and showing the reason why they were not produced earlier, and only after an order permitting them to be exhibited was passed by the board of enquiry, or they could have been produced and exhibited at the instance of the board of enquiry. We were not informed by counsels as to whether these documents were exhibited by the prosecution at their own instance, or were exhibited as result of an order passed by the board of enquiry. If they were exhibited at the instance of the prosecution, the petitioner ought to have opposed the application for permission to file the documents, and in the event of the documents being exhibited should have moved the board of enquiry for time being granted to him to cross-examine witnesses in respect of contents of the documents or to lead evidence in rebuttal. It has not been established that the petitioner took either of these two steps. This being so, the mere fact that the documents were permitted to be filed and proved by the prosecution and brought on the record cannot by itself lead to the conclusion that the petitioner could be said to be prejudiced by such a procedure, for in these circumstances the petitioner would be deemed to have waived his objection to the filing of these documents.

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The same would be the position in case the documents were filed at the instance of the board of enquiry. This contention too has, therefore, to be rejected.

Counsel has then contended that the petitioner filed true copies of certain documents along with his written statement. Thereafter, he moved an application before the Enquiry Board (Ann "XXXVIII" to the petition) that inasmuch as the original documents had not been filed by the prosecution, the documents filed along with the written statement, be made a part of the record. A list of such documents is annexed along with Ann XXXVIII to the writ petition. It appears that some of the documents enumerated in Ann "XXXVIII" were marked as Ex. B-25, but some documents do not appear to have been marked as defence exhibits. Counsel for the petitioner has contended that the board of enquiry made a grievous error in not considering or referring to these documents in its decision. A perusal of the report of the enquiry board indicates that all the documents set out in Ann XXXVIII are not mentioned in the decision. But from this fact alone, it cannot be said that the board of enquiry omitted to take these documents into account, on the ground that they were secondary evidence of originals, and as such could not be considered. The normal presumption is that a Tribunal refers only to such material as is relied upon by a party, and inasmuch as these documents have not been referred by the board of enquiry, it is suggestive of the result that the petitioner did not rely on these documents to substantiate his case. Nothing has been shown to us that the petitioner after submitting the application that these documents be brought on the record relied on them in the course of arguments advanced before the board of enquiry. This being so, it seems that the petitioner kept silent after moving the application for the documents being

brought on the record, and did not rely upon them in course of arguments addressed before the board of enquiry, and as such no grievance can be made on this score. This conclusion is fortified by the fact that the Tribunal did refer to two documents out of this list, the original of which were not filed, but did not rely upon them on account of certain other circumstances appearing on the record. Counsel, in this context urged that the petitioner might not have relied upon these documents in course of arguments for the reason that he may have thought that in the absence of originals, the documents in question would not carry weight with the board of enquiry. We are unable to accept this contention. The petitioner, in the circumstances, should have drawn attention of the board to the documents in the course of arguments, and urged that they could be looked into in the absence of originals which were not available. This apart, there is nothing to indicate apart from the filing of the application, that the petitioner made any attempt to establish as a fact that the originals were not available and as such secondary evidence of the contents of these documents should be taken into account. No party has an indefeasible right to rely on secondary evidence unless he establishes that the originals are either destroyed or have been suppressed by the prosecution. This does not appear to have been done, and as such the board of enquiry was not bound to consider the secondary evidence produced by the petitioner. The contention of the petitioner that inasmuch as the board of enquiry did not consider the secondary evidence produced by the petitioner, the findings recorded by it are vitiated, has as such to be repelled. In view of this conclusion, it is not necessary to consider the arguments raised on behalf of the respondent that even if the findings of the Tribunal in respect of some charges is vitiated, inasmuch as there is no flaw in the findings recorded

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in respect of other charges, the order of the dismissal cannot be struck down, for each of the charge levelled against the petitioner, is of such a nature as would sustain the dismissal order

A perusal of the report of the board of enquiry reveals that it has taken great pains to discuss the entire prosecution and defence version and has given detailed reasons for arriving at this conclusion. The order of dismissal passed by the Government of India is also a well considered order. We are satisfied that the petitioner was afforded a reasonable opportunity to substantiate his case and got a fair hearing. The contention, that there has been a violation of Art 311 of the Constitution has as such to be rejected.

The special appeal is accordingly partly allowed and the order of the learned single Judge dated 9th October, 1972 is quashed but the writ petition filed by the petitioner is dismissed. In the circumstances of the case, parties shall bear their own costs.

*Order accordingly*

### APPELLATE CIVIL

*Before Mr. Justice Yashodanandan and Mr Justice  
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HAFIZ JAN MOHAMMAD

AND ANOTHER

APPELLANTS,

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*v*

STATE TRANSPORT AND OTHERS RESPONDENTS

*Motor Vehicles Act, 1939, ss 47 and 57—Increase in the strength of route—Applications invited to fill up the vacancies created by increased strength—Some of the vacancies filled up—Further road strength increased—Applications*

*again invited—All the applications old and new to be considered to fill up new vacancies if earlier applications remained undisposed of.*

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The law does not contemplate the creation of vacancies or filling up of these vacancies by specific applications for a particular vacancy. At every moment of time when applications are to be considered for grant of permit the authority has to take into consideration the existing vacancies. It is immaterial when the application had been made. The Regional Transport Authority could not grant permit without considering all the applications that were pending consideration on relevant date. *Held*, that the applications had not become infructuous or virtually disposed of after the twelve vacancies had been filled up by displaced operators and that the applications could be considered only for two remaining vacancies out of earlier twelve vacancies and not for the vacancies that came into existence by the raising of strength subsequently.

Special Appeal no 682 of 1970 from the judgment and order passed by W BROOME, J in Civil Misc. Writ Petition No 2026 of 1965, dated 23rd July, 1970

S. K. Dhaon, for the Appellant.

H SWARUP, J.—These four appeals have been filed against the judgment of a learned single Judge.

In March 1959, as a result of amalgamation of routes, increase in strength was made on the Meerut—Chhaprauli Route and the strength came to 65 and there were 12 vacancies still to be filled. Applications were made by a large number of persons but the same could not be immediately disposed of. Ten displaced operators from the Delhi—Saharanpur Route were subsequently accommodated in the Meerut—Chhaprauli Route. In May 1961 the strength of the route was further raised by ten and the final strength became 75. Nine displaced persons were again accommodated on this route. On 16th October, 1968 Hafiz Jan Mohammad and Mohammad Arif applied for grant of permit on the route in question and their application was published in the *Gazette* on 2nd November, 1963. Applications

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of 913 persons, including that of H. K. Gupta which were still pending, were published in the *Gazette* on 21st March, 1964. The Regional Transport Authority considered the application of Hafiz Jan Mohammad and Mohammad Arif in its sittings between December 1963 and May 1964 and on 1st May, 1964 dismissed it as time-barred. Against that order Hafiz Jan Mohammad and Mohammad Arif filed an appeal before the State Transport Appellate Tribunal. The persons who had applied for permits on this route and the persons who had filed objections to the grant of permit to Hafiz Jan Mohammad and Mohammad Arif were not made parties. The State Transport Appellate Tribunal, on 7th May, 1965, allowed the appeal and directed that permit be granted for a stage carriage to the appellants. In pursuance of this order permit was granted.

Hari Kishan Gupta filed Writ Petition No 2026 of 1965 challenging the grant of permit and the order passed in appeal in favour of Hafiz Jan Mohammad and Mohammad Arif primarily on the ground that permit to them could not be granted without adjudication of their applications which were still pending. Another petition, namely, Petition No 2024 of 1965 was filed by Murari Lal Gupta who had filed an objection to the application of Hafiz Jan Mohammad and Mohammad Arif and by the Meerut—Baghpat—Chhaprauli Motor Union through its Secretary Murari Lal Gupta. This petition was filed mainly on the ground that the increase in strength was not valid and that the Appellate Tribunal had allowed the appeal without giving an opportunity of hearing of these persons.

The learned single Judge allowed the writ petition filed by Hari Kishan Gupta on the finding that permit could not be granted in favour of Hafiz Jan Mohammad and Mohammad Arif without the remaining applications being considered on merits and compared. The

learned single Judge also held that the application of these two persons was not time-barred. On these findings the order of the Appellate Tribunal dated 7th May, 1965 as well as the order of the Regional Transport Authority granting the permit was quashed and a *mandamus* was issued directing the Regional Transport Authority, Meerut to consider the applications of the petitioner Hari Kishan Gupta and the other 912 persons which had been published in the *Gazette* on 21st March, 1964 as well as the application of Hafiz Jan Mohammand and Mohammad Arif published on 2nd November, 1963 and to pass orders for filling up the vacancy after comparing the respective merits of the applicants

During the pendency of the writ petition, Murari Lal Gupta had filed an application for stay of operation of the appellate order as well as the grant of permit to Hafiz Jan Mohammad and Mohammad Arif and this Court had passed an interim order permitting Hafiz Jan Mohammad and Mohammad Arif to ply their vehicle subject to the condition that they deposit Rs 1,000 00 per month and if the writ petition is allowed, the total amount so deposited by them shall be distributed in accordance with the directions of the Court to be made at the time when the writ petition is disposed of. At the time of the final disposal of the writ petition the miscellaneous matter was also disposed of by the learned single Judge. It was held that Murari Lal Gupta was entitled to get Rs 416 out of the money deposited in compliance of the interim order mentioned above. This was estimated as compensation for the loss suffered by him due to the continuance of the permit. The remaining amount was directed to be refunded to Hafiz Jan Mohammad and Mohammad Arif.

Against the issue of the writ of *certiorari* and *mandamus*, Hafiz Jan Mohammad and Mohammad Arif filed

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Special Appeal No 682 of 1970. Against the refusal to issue a separate writ in the case of Murari Lal Gupta and another Special Appeal No. 619 of 1970 has been filed by Murari Lal Gupta and the Motor Union. In respect of the order disposing of the amount deposited in compliance with the interim order Murari Lal Gupta has filed Special Appeal No 672 of 1970 and Hafiz Jan Mohammad and Mohammad Arif have filed Special Appeal No 709 of 1970.

Before the learned single Judge only one point was urged in support of the order passed by the State Transport Appellate Tribunal and that was to the effect that as the application of Hari Kishan Gupta was in respect of the vacancy created earlier and not in respect of the vacancies created later in which Hafiz Jan Mohammad and Mohammad Arif had been granted the permit, he had no right to challenge the order on the ground that his application had not been considered. Learned single Judge did not accept the contention but held that all the persons were entitled to be considered for all the vacancies. Before us learned counsel for Hafiz Jan Mohammad and Mohammad Arif has tried to raise additional points also. The first contention of Hafiz Jan Mohammad and Mohammad Arif is that the applications filed for permit by Hari Kishan Gupta and others should be deemed to be in respect of only the vacancies which had been notified in 1959 and not in respect of the vacancies notified subsequently and that permit granted to Hafiz Jan Mohammad and Mohammad Arif was in respect of the subsequent vacancy. On the basis of these assertions it was contended that Hari Kishan Gupta had no right to challenge the permit granted to Hafiz Jan Mohammad and Mohammad Arif. The contention is that when ten displaced persons were accommodated on the route only two of the earlier vacancies remained to be filled and when subsequently



other displaced persons were accommodated, those two vacancies should be deemed to be filled and consequently all the applications made before the accommodation of these displaced persons should be deemed, in law, to have been refused. It is further contended that if the subsequent accommodation of displaced operators is not treated as being made for the vacancies already existing from before then only those two should be deemed to be available for the applicants. It is claimed that none of the persons were entitled to be considered for the vacancies subsequently declared in 1961 and hence Hafiz Jan Mohammad and Mohammad Arif were the only persons entitled to get the permit. We are not impressed by the argument.

S 47 of the Motor Vehicle Act deals with the procedure which the Regional Transport Authority has to follow in considering the applications for stage carriage permits. The considerations are mentioned in sub-s (1) of s. 47. Sub-s. (3) of s. 47 of the Act provides:

"(3) A Regional Transport Authority may, having regard to the matters mentioned in sub-s. (1), limit the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region."

This provision does not contemplate the creation of vacancies but only imposition of a restriction. This restriction has been imposed in the interest of public generally taking into consideration the need of the passengers. Under s 47 of the Act an application can be rejected if it is not in the interest of public generally, i.e., also on the ground that adequate number of persons are already serving on the route. The fixation of strength only places the upper limit. If the vacancy

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remains every person becomes entitled to be considered for the permit. S. 57 of the Motor Vehicles Act provides the procedure for granting permit. Sub-s. (2) of s 57 runs as follows:

“(2) an application for the stage carriage permit or a public carrier’s permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or if the Regional Transport Authority appoints dates for the receipt of such applications on such dates.”

The law, therefore, does not contemplate the creation of vacancies or filling up of these vacancies by specific applications for a particular vacancy. At every moment of time when applications are to be considered for grant of permit the authority has to take into consideration the existing vacancies. It is immaterial when the application had been made. A similar view was taken by this Court in the case of *Sri Mahabir Prasad Srivastava v The State Transport Appellate Tribunal, U P* (1) We are, therefore, in agreement with the learned single Judge that the Regional Transport Authority could not grant permit to Hafiz Jan Mohammad and Mohammad Arif without considering all the applications that were pending on the relevant date. We are unable to accept the contention of the learned counsel that the applications had become infructuous or virtually disposed of after the twelve vacancies had been filled by displaced operators, nor are we prepared to accept the contention that the applications of Hari Kishan Gupta and others could be considered only for the two remaining vacancies out of the earlier twelve vacancies and not for the vacancies that came into existence by the raising of the strength subsequently in 1961.

(1) Spl. App, No. 689 of 1968.

The next contention of the learned counsel is that as Hari Kishan Gupta had not filed objections against the application for grant of permit made by Hafiz Jan Mohammad and Mohammad Arif, they cannot challenge the grant of permit to them. Again we are not prepared to accept the contention as it was not necessary for Hari Kishan Gupta and other applicants to raise objections against the grant of permit to these persons. They were all applicants and were in competition with Hafiz Jan Mohammad and Mohammad Arif and were entitled to get the permit if their claim was comparatively better. Hence, there was no occasion for raising objections.

It was then contended that as subsequently in December 1967 Hari Kishan Gupta's application had been rejected by the Regional Transport Authority, he cannot raise any objection now. This point was never raised before the learned single Judge. We accordingly do not permit this point to be raised at this stage, particularly in view of the statement made by counsel for Hari Kishan Gupta that the application has not been rejected *qua* the vacancy which had been filled by Hafiz Jan Mohammad and Mohammad Arif. That vacancy still remains and has to be filled in accordance with law. As the permit in favour of Hafiz Jan Mohammad and Mohammad Arif was not granted in accordance with law the application *qua* that vacancy cannot be deemed to have been rejected. Thus on merits also the contention has no force.

Lastly the learned counsel contended that this Court should not direct the Regional Transport Authority to consider the applications of all the 913 persons, including Sri Hari Kishan Gupta but should direct that the application of Sri Hari Kishan Gupta alone be compared with that of Hafiz Jan Mohammad and

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Mohammad Arif We are unable to accept this prayer also. Once the order granting permit to Hafiz Jan Mohammad and Mohammad Arif is quashed, the vacancy becomes open and the status *quo ante* as it existed on the date on which permit was illegally granted to Hafiz Jan Mohammad and Mohammad Arif, has to be restored. Certainly, if some applications had already been disposed of before that date or were not validly pending will not be considered.

So far as the question of disposing of the amount deposited by Hafiz Jan Mohammad and Mohammad Arif is concerned, there is not sufficient material on record on the basis of which it may be possible for us to determine the loss suffered by Murari Lal Gupta, the existing operator. The material is not enough either for determining the actual profits earned by Hafiz Jan Mohammad and Mohammad Arif on the basis of the interim order or for determining the actual loss suffered by Murari Lal Gupta. The amount cannot, therefore, be disbursed and will have to be paid back to Hafiz Jan Mohammad and Mohammad Arif. This order will, however, not debar any party from seeking any remedy that may in law be open to it, to claim damages

In the result Special Appeal No 682 of 1970 is dismissed

Special Appeal No 709 of 1970 is allowed. The order of the learned single Judge is modified and it is directed that the entire amount deposited by Hafiz Jan Mohammad and Mohammad Arif shall be refundable to them and no amount shall be payable to Murari Lal Gupta

Special Appeal No 619 of 1970 is dismissed.

Special Appeal No 672 of 1970 is dismissed

Hari Kishan Gupta will be entitled to his costs in Special Appeal No 682 of 1970 In other appeals the parties will bear their own costs

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*Ordered accordingly*

## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr Justice  
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RESPONDENT

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**U. P. Disciplinary Proceedings (Administrative Tribunal)**  
Rules 1947, r. 4(2)—*Service of charge-sheet on the officer—*  
*Request for enquiry by Tribunal—When to be made*

When a charge-sheet is served upon a Government servant he has to make up his mind whether he would like the charges to be enquired into by the Tribunal and if so to make a request at that stage. If once, the officer elects that the charges be enquired into by the authority under the Civil Service (Classification, Control and Appeals) Rules, the stage for his exercising the option in favour of the Tribunal is past and the officer no longer possesses the discretion to have the case referred to the Tribunal

*State of U. P. v. Jogendar Singh* (1) explained.

Special Appeal No. 144 of 1973 from the judgment and order dated 5th March, 1973 passed by R. L. GULATI, J. in Civil Miscellaneous Writ No. 1132 of 1972.

*K C Agarwal and S C., for the Appellants.*

*G D Srivastava, for the Respondent.*

(1) A.I.R. 1963 S.C. 1818

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S CHANDRA, J. —Ram Krishna, the respondent, was officiating Superintending Engineer, Irrigation Works Circle, Faizabad, when on 4th October, 1967, he was suspended pending enquiry into certain charges. A charge-sheet was served on him on 29th November, 1967. The enquiring officer in his report dated 29th February, 1968, held that the charges had not been proved. The State Government however, did not agree with the finding and decided that the respondent should be warned and an adverse entry should be made in his character roll. It was also decided to revert him to his substantive post of Executive Engineer. To this end a show cause notice was issued to him.

At this stage the State Government served upon the respondent two further charge-sheets on 24th July, 1968. Sri O D Sharma, the Additional Chief Engineer, was appointed to enquire into these charges. He conducted an enquiry and submitted his report to the State Government. The enquiring officer reported that 'nine of the charges' had been proved. The State Government examined the matter and came to a contrary conclusion. It decided that dismissal from service was the appropriate punishment. Accordingly on 16th October, 1969, it served a notice upon the respondent to show cause why he should not be dismissed from service. The respondent submitted his reply on 15th November, 1969. While the matter was pending decision before the State Government, the respondent on 19th January, 1970, made a representation to the State Government in which he stated that 'he was a Gazetted Officer under the Government of U P. and was entitled to demand that the enquiry into the charges against him be referred to the U. P. Administrative Tribunal. In the prayer clause it was mentioned that if in the opinion of the Government, the written statement does not demolish the charges, then the charges

be referred to the U P Administrative Tribunal for a full and formal enquiry. The State Government, however, did not consider it feasible to refer the matter and so it ultimately passed an order dismissing the respondent from service on 23rd June, 1972.

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The respondent challenged the order of dismissal by way of a writ petition. A learned single Judge held that it was not necessary to go into the question whether the charges had been established and the order of punishment was legal, because the petition had to succeed on another ground. The learned Judge held that under r 4(2) of the U P Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 it was incumbent upon the Government to refer the case of a Government servant who is covered by r 4(1) to the Administrative Tribunal for enquiry. In this case the respondent did specifically make a request for reference. The Governor had no power to refuse the request. In support reliance was placed upon the Supreme Court decision in *State of Uttar Pradesh v Jogendra Singh* (1). On this view the writ petition was allowed and the order of dismissal was quashed. Aggrieved, the State Government has come up in appeal.

R 4(1) confers a discretion upon the Governor to refer cases of the kind mentioned in its various clauses to the Tribunal. R 4(2) says that the Governor may refer the case of a Gazetted Government servant on his own request to the Tribunal. Construing this rule the Supreme Court in *Jogendra Singh's* case (1) held that the use of the word 'may' in sub-r (2) was indicative of a command. The Governor had no discretion not to refer a case where the delinquent officer makes a request. It was observed

"In other words, the plain and unambiguous object of enacting r 4(2) is to provide an option

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to the Gazetted Government servants to request the Governor that their cases should be tried by a Tribunal and not otherwise "

Clearly the rule was construed as giving an option to the charged officer to have the charges against him tried either by the departmental authority under the Civil Services (Classification, Control and Appeal) Rules or by the Administrative Tribunal under the U P Disciplinary Proceedings (Administrative Tribunal) Rules. The construction placed upon this rule by the Supreme Court is clearly indicative of the position that the charged Government servant has not been conferred an option to have a second innings before the Administrative Tribunal after he has undergone willingly the enquiry before the departmental authorities under the Civil Services (Classification, Control and Appeal) Rules. In this view of the matter it is obvious that there is an implicit limitation as to the stage or time up to which the option can be exercised. When a charge-sheet is served upon a Government servant he has to make up his mind whether he would like the charges to be enquired into by the Tribunal and if so to make a request at that stage. If once the officer elects that the charges to be enquired into by the authority under the Civil Services (Classification, Control and Appeal) Rules, the stage for his exercising the option in favour of the Tribunal is past and the officer no longer possesses the discretion to have the case referred to the Tribunal.

This construction is supported by the other rules. A reading thereof shows that the Tribunal is to make an appropriate enquiry into the charges. The Tribunal gives an opportunity to the delinquent officer to offer his explanation in respect of the charges. Under r. 9,



after completing the proceedings the Tribunal shall make a record of the case in which it shall state the charges, the explanation, its own findings and the views of the assessors. It is also to recommend the appropriate punishment. It is apparent that the Tribunal has to conduct an enquiry and record its findings and recommendations to the Governor. In our opinion, these rules do not contemplate two parallel enquiries into the same set of charges. The rules contemplate an original enquiry into the charges at the hands of the Tribunal. They do not contemplate a sort of an appeal to the Tribunal as against the findings recorded, if any, by the authority constituted under the Civil Services (Classification, Control and Appeal) Rules.

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In the present case the respondent made a request for reference to the Tribunal on 19th January, 1970, after receipt to show cause notice why he should not be dismissed and after he had even furnished his reply. That was too late a stage for making such a request. The State Government was justified in ignoring it. The order of dismissal could not be quashed on that ground.

Since the petition proceeded on other points as well on which the learned single Judge has not expressed any opinion, the case has to go back.

In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the matter is sent back to the learned single Judge for decision of the writ petition in accordance with law. The appellant will be entitled to the costs of the appeal.

*Appeal allowed*

## APPELLATE CIVIL

Before Mr Justice S Chandra and Mr Justice  
K N Seth

HARI SHANKAR AND OTHERS

APPELLANTS,

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RESPONDENTS

**U. P. Consolidation of Holdings Act, 1953, s 12-C, as it stood before the amendment of the Act—Appellate order under s 12-C in partition proceedings after the coming into force of the Amending Act no 8 of 1963—Revision lies against such order under s 48 of the amended Act—Scope of sub-ss (1) and (2) of s 47 of the Amending Act**

S 47(1) of the Amending Act 8 of 1963 was not applicable to a contemplated proceeding in revision to be instituted after coming into force of the Amending Act. Thus the conditions mentioned in sub-s (2) of s 47, namely that "all other work, to which the provisions of sub-s (1) do not apply" are fulfilled. A revision which may be instituted after the coming into force of the Amending Act would be governed by sub-s (2) because to such a revision the provisions of sub-s (1) were not applicable. Hence proceedings in revision under s 48 of the Act would well be within the purview of the phrase "all other work" occurring in sub-s (2) of s 47. Such a revision would be governed by the Amended Act.

*Held*, that where the Settlement Officer passed the appellate order on 19th June, 1964 after coming into force of the Amended Act, the revision filed by the appellants was maintainable and was entitled to be conducted and concluded in accordance with the Amended Act.

Special Appeal No 1079 of 1970 against the judgment of S N SINGH, J in Civil Misc Writ No 4046 of 1965, dated 21st July, 1970

V K S Choudhary, for the Appellants

G C Dwivedi and S C, for the Respondents.

S CHANDRA, J.—This special appeal arises out of proceedings for partition conducted under the U P Consolidation of Holdings Act. The Consolidation Officer decided the partition proceedings on 19th February, 1964. Aggrieved, both parties filed cross

appeals. The Settlement Officer by his order dated 9th June, 1964, disposed of the appeals. Aggrieved, the appellants filed a revision. The Deputy Director of Consolidation dismissed the revision on the ground that it was not maintainable. The appellants then instituted a writ petition. A learned single Judge upheld the finding that the revision was not maintainable. He repelled the other submissions on the merits and dismissed the writ petition.

In the present appeal Mr *Chaudhary* has reiterated the plea that the revision was maintainable.

Under the U P Consolidation of Holdings Act as it stood prior to its amendment by Amending Act No. 8 of 1963, which came into force on 8th March, 1963, the position was that the order of the Settlement Officer disposing of an appeal in partition proceedings was made final by s 12-C of the Act. S 48 which conferred revisional jurisdiction was confined to questions of jurisdiction and to orders passed by the Deputy Director of Consolidation. In other words, orders passed by other subordinate consolidation authorities were not amenable to the revisional jurisdiction.

The Amending Act No. 8 of 1963 brought about drastic changes in the Act. It repealed s 12-C with the result that the finality attached to the Settlement Officer's appellate orders disappeared. S 48 of the Act was repealed and re-enacted. Now the revisional power extended to questions of fact and law as well and it governed orders passed by all subordinate authorities, which term includes the Settlement Officer. The result was that under the amended Act a revision became maintainable against order passed in partition proceedings.

S 47 of the Amending Act provided the transitory provisions. It reads:

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“47 *Transitory provisions*—(1) In units notified under s 4 of the principal Act, prior to the date on which this Act comes into force, hereinafter referred to as the said date, all work in regard to or connected with consolidation operation—

(i) beyond the stage of publication of the Statement of Proposals under s 20 of the principal Act, where, on or before the said date, that statement had already been published, and

(ii) up to and inclusive of the stage of confirmation of the Statement of Principles under s. 18 of the principal Act, where, on or before the said date, notices under s 9 of the principal Act had already issued,

shall be conducted and concluded in accordance with the provisions of the principal Act as if this Act had not come into force

Provided that, as respects second appeals and revisions, which lay under the provisions of the principal Act, as it stood prior to its amendment by this Act but had not been instituted before the said date, the principal Act, as amended by this Act, shall apply and be deemed always to have applied as if this Act had been in force on all material dates

(2) All other work, to which the provisions of sub-s (1) do not apply, shall be conducted and concluded in accordance with the provisions of the principal Act as amended by this Act

*Explanation*—In units where notices under s 9 of the principal Act had not been issued on or before the said date, any work done shall, for the purposes of this sub-section, be deemed always to

have been done under the provisions of the principal Act as amended by this Act.

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Since no revision was provided for or lay under the unamended Act against the appellate order passed by the Settlement Officer in partition proceedings, it cannot be said that any such revision lay under the principal Act so as to attract the proviso to sub-s (1). Similarly, since no such revisional proceedings were contemplated by the unamended Act, no question of holding that a revision was a proceeding up to and including of the stage of confirmation of the Statement of Principles under s 18 of the principal Act could arise within meaning of cl (ii) of sub-s. (1). It is thus evident that sub-s. (1) of s 47 as such was not applicable to a contemplated proceeding in revision to be instituted after the coming into force of the Amending Act. Thus the conditions mentioned in sub-s (2) namely that "all other work, to which the provisions of sub-s (1) do not apply" are fulfilled. A revision which may be instituted after the coming into force of the Amending Act would be governed by sub-s (2) because to such a revision the provisions of sub-s (1) were not applicable. In our opinion, proceedings in revision under s. 48 of the Act could well be within the purview of the phrase "all other work" occurring in sub-s (2). Such a revision would be governed by the amended Act.

In the present case the Settlement Officer passed the appellate order on 19th June, 1964, i.e. after the coming into force of the Amending Act. Under the amended s. 48 a revision lay against an order passed by the Settlement Officer and the revisional jurisdiction extended to questions of fact as well as law. The revision filed by the appellants was maintainable and was entitled to be conducted and concluded in accordance with

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the amended Act The view taken by the Deputy Director as well as by the learned single Judge to the contrary cannot be sustained

In the result, the appeal succeeds and is allowed The judgment of the learned single Judge is set aside The writ petition is allowed The order of the Deputy Director is quashed The matter is sent back to the Deputy Director for disposal of the revision in accordance with law The parties may, however, bear their own costs

*Appeal allowed.*

## SUPREME COURT

## APPELLATE CIVIL

Before Mr Justice K S Hegde, Mr Justice A N  
Grover and Mr Justice H R Khanna

1 DIRECTOR, PANCHAYAT  
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APPELLANTS,

2 STATE OF U P (In C. A  
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v.

1 BABU SINGH GAUR (In  
C A No 1011 of 1966)

2 JUGAL KISHORE BHATT  
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(In C A No 1012 of 1966)

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MORADHWAJ CHAUHAN (In  
C A No 1012 of 1966)

INTERVENER

*Constitution of India, Art 309—Financial Handbook, Vol II,  
Pt II and Fundamental Rules, r 26(d)—Temporary posts  
held by officers of Sales Tax and Panchayat Raj Depart-  
ments—Order conferring substantive capacity for certain  
purpose—Effect*

The substantive capacity conferred on the officers holding temporary posts in the Sales Tax Department as well as in the Panchayat Raj Department was for a specific purpose i.e. counting leave for increment purpose, and for no other purpose. That order did not convert the appointments of the temporary government servants in those departments either into permanent appointments or into temporary appointments is substantive capacity in permanent posts

——, Art 309—Rules framed thereunder—Temporary appointed government servant holding a permanent post—Not a permanent government servant

A temporary government servant does not become a permanent government servant unless he gets that capacity either under some rule or he is declared or appointed by the Government as a permanent government servant. There was no

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rule under which respondent could be considered as having been appointed either permanently or in a substantive capacity to permanent posts. All along they continued to be temporary government servants whether posts held by them were temporary posts or permanent posts.

Civil Appeals Nos 1011 and 1012 of 1966 from the judgments and decrees dated the 12th February, 1965 and 10th November, 1964 of the Allahabad High Court in Special Appeals Nos 298 of 1960 and 483 of 1962 respectively.

*G N Dixit*, (*O P Rana* with him), for the Appellants in both the appeals.

*W. S. Barlingay* (*M K Pandey*, *S K Sabharwal* and *Ganpat Rai* with him), for the Respondents in both the appeals.

*J P Goyal* and *R K Bhatt*, for the Intervener in C A No 1012 of 1966.

HEGDE, J.—These are appeals by special leave. A common question of law arises for decision in these two appeals. Hence it is convenient to consider them together. The material facts are more fully set out in Civil Appeal No 1012 of 1966. We shall set out those facts in detail. We shall refer to the facts of Civil Appeal No 1011 of 1966 thereafter, briefly.

The respondent in Civil Appeal No 1012 of 1966, Jugal Kishore Bhatt was appointed as the Sales Tax Officer on 29th June, 1948 by the Governor of U P. At the time of his appointment the posts of Sales Tax Officers were temporary posts. He joined the service in the Sales Tax Department at Bareilly on 15th July, 1948. His appointment was on temporary basis. He continued to serve in that department as Sales Tax Officer until the year 1951 on temporary basis. In that year the Government issued G O no ST-419/X-941. Para 4 of that order provided that as the posts detailed in the list annexed to the G O. are like-



ly to last for more than three years, the Governor is pleased to declare that the appointments made to those posts will be deemed to have been made in a substantive capacity and the incumbents thereof (shown in the list other than those who are appointed to officiate in leave vacancies shall be treated as holders of those posts in a substantive capacity within the meaning of the other of the Governor regarding Fundamental Rule 26(d) of the Financial Handbook, Vol II, Pt II with retrospective effect from the date of their first appointments to those posts. The respondent continued in the department as Sales-tax Officer until 1953. In that year the Governor of U P in exercise of the powers conferred upon him by the provisions of Art. 309 of the Constitution made the following rule:

“(1) Notwithstanding anything to the contrary in any existing rules and orders on the subject, the services of a government servant in temporary service shall be liable to termination at any time by notice in writing given either by the government servant to the appointing authority or by the appointing authority to the government servant.

(2) The period of such notice shall be one month given either by appointing authority to the government servant, or by the government servant to the appointing authority, provided that in the case of notice by the appointing authority, the latter may substitute for the whole or part of this period of notice, pay in lieu thereof; provided further that it shall be open to the appointing authority to relieve a government servant without any notice or accept notice for a shorter period without requiring the government servant to pay any penalty in lieu of notice.

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(3) This rule shall take immediate effect and shall apply to all persons who are appointed hereafter in a civil post in connection with the affairs of Uttar Pradesh and who are under the rule-making control of the Governor, but who do not hold a lien on any permanent Government post.

(4) In this rule "temporary service" means officiating and substantive service in a temporary post, and officiating service in a permanent post, under the U P Government.

(5) Nothing in this rule shall apply to—

(a) government servant engaged on contract,

(b) government servant not in whole-time employment;

(c) government servant paid out of contingencies;

(d) person employed in work-charged establishments."

Sometime in February 1953, the respondent was informed by the Commissioner of Sales Tax, U P. that his appointment would terminate on 31st March, 1953, but he could be re-employed in the post but he will be subject to the rule set out earlier. The respondent was asked to intimate to the Government by 23rd March, 1953 whether he was prepared to be re-employed from 1st April, 1953 on the said terms. The respondent signified his consent for re-appointment on the terms mentioned in the letter. Thereafter he continued in service up to 31st March, 1954. Subsequently his appointment was extended for a period of one year from 1st April, 1954 to 31st March, 1955.

Meanwhile by G. O. no. ST-896/X—911-D-55, dated 27th April, 1955, the Governor was pleased to

sanction the extension of the posts of Sales Tax Officer up to 31st March, 1956

On 22nd May, 1956, the Governor was' pleased to issue G. O. no ST-2562/X—911-A This G O is important. Hence we shall quote the same in full.

"G. O. no ST-2562/X—911, dated 22nd May, 1956 from the Deputy Secretary to Government to Commissioner, Sales Tax.

SUBJECT. Conversion of sixty-one temporary posts of S. T. O. into permanent one

With reference to your letter no. E-1-Cent-13-13814/ST, dated 13th February, 1956, I am directed to convey the sanction of the Governor to the conversion, with effect from 1st April, 1955, of sixty-one temporary posts of S T. Os, in the scale of Rs 250—25—600 sanctioned for the Sales Tax Department, the term of which was last extended up to 31st March, 1956, in G O. no ST-896/X—911-55, dated 26th April, 1955 into permanent ones That G O should be deemed to have been modified accordingly Orders regarding the confirmation of individual officers in these posts will issue separately

The charge on the above account should be debited to the relevant primary units under the head "13—Other Taxes and Duties—C Charges in connection with the U P. Sales Tax Act, 1948 in the budget"

On 1st May, 1958, the State Government terminated the services of the respondent by giving him one month's notice. The respondent represented against the notice terminating his service but his representation was rejected Thereafter he challenged the order of his termination before the Allahabad High Court

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by means of a writ petition under Art. 226 of the Constitution. His writ petition was accepted by the learned single Judge and the impugned order was set aside. That order was affirmed by a Division Bench. Aggrieved by that order, the Government has brought this appeal.

Now turning to the facts in Civil Appeal No 1011 of 1966, the respondent therein was appointed as a temporary Panchayat Raj Inspector on 6th June, 1949. Officers appointed temporarily under the Panchayat Raj Scheme were also declared to hold their temporary posts in a substantive capacity, within the meaning of the order of the Governor regarding Fundamental Rule 26(d) of the Financial Handbook, Vol II, Pt. II with retrospective effect from the date of their first appointment to those posts. They were also made subject to the rule made under Art. 309 referred to earlier. The temporary posts under the Panchayat Raj Scheme were converted into permanent posts subsequently. The services of the respondent Babu Singh Gaur were terminated, by giving him one month's notice, on 12th September, 1958. Babu Singh Gaur also challenged his termination by means of a writ petition under Art. 226 of the Constitution before the Allahabad High Court. His writ petition was dismissed by a single Judge but in appeal the Letters Patent Bench allowed his plea and set aside the impugned order. The Government has appealed against that order.

It is admitted that the respondents in both these appeals were appointed temporarily. At the time of their initial appointment, the posts to which they were appointed were also temporary. Sometime after their appointment, their appointments though temporary were declared to be on substantive capacity within the meaning of the order of the Governor re-

garding Fundamental Rule 26(d), Financial Handbook, Vol II, Pt II with retrospective effect from the date of their first appointment to their posts Fundamental Rule 26(d) says:

"If a government servant's tenure of a temporary post is interrupted by duty in another post or by leave other than extraordinary leave or by foreign service, such duty, leave or foreign service counts for increments in the time-scale applicable to the temporary post if the government servant returns to the temporary post."

Provided that the Government may, in any case where they are satisfied that the leave was taken on account of illness or for any other cause beyond the government servants' control, direct that extraordinary leave shall be counted for increments under this clause"

The order of the Government regarding r 26(d) reads thus:

"Under this rule if a government servant's tenure of a temporary post is interrupted by leave, the leave counts for increments to the time-scale applicable to the temporary post, but under cl (b) of this rule if a government servant officiating in a permanent post takes leave and returns to his officiating tenure of that post on the expiry of the leave, the leave does not count for increments in the time-scale applicable to that post as during such leave he is treated as having reverted to his substantive post, if any. The difference in the treatment accorded to leave granted under similar circumstances arises from the fact that appointments to temporary posts even of short duration, are usually made in a substantive capacity. But

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neither the practice of making almost all appointments to temporary post in a substantive capacity nor the difference of treatment to which it gives rise is justified. Therefore, although these rules as they stand admit of both a substantive appointments to temporary posts should be made only in a limited number of cases, as for example when posts are to all intents and purposes quasi-permanent or when they have been sanctioned for a period of not less than three years, or there is reason to believe that they will not terminate within that period. In all other cases, appointment to temporary posts should be made in an officiating capacity only."

It is clear from the rules as well as the order of the Governor that they merely dealt with leave and increment. That order has nothing to do with the nature of the appointment. The fact that for certain specified purposes those temporary appointments were to be considered to be in a substantive capacity, does not mean that the appointees were holding the posts in question in a substantive capacity for all purposes. For purposes other than mentioned in the order, their appointments continue to be temporary.

The learned Judges of the Letters Patent Bench thought that as Babu Singh Gaur and Jugal Kishore Bhatt were holding their posts in a substantive capacity, though temporarily, after the posts held by them were made permanent, they must be held to have been holding those permanent posts in a substantive capacity. In our opinion this is an erroneous reasoning. The order which converted those temporary posts into permanent posts specifically stated that "order regarding the confirmation of individual officers in these posts will issue separately". At the time of the con-

version of temporary posts into permanent posts, the Government did not consider the question as to who all should be confirmed. Obviously, the Government wanted to consider that question separately.

The substantive capacity conferred on the officers holding temporary posts in the Sales Tax Department as well as in the Panchayat Raj Department was for a specific purpose i.e. counting leave for increment purpose, and for no other purpose. That order did not convert the appointments of the temporary government servants in those departments either into permanent appointments or into temporary appointments in substantive capacity in permanent posts.

A temporary government servant does not become a permanent government servant unless he gets that capacity either under some rule or he is declared or appointed by the government as a permanent government servant. Our attention has not been invited to any rule under which respondents in these appeals can be considered as having been appointed either permanently or in a substantive capacity to permanent posts. All along they continued to be temporary government servants whether the posts held by them were temporary posts or permanent posts.

This Court in *Purshotam Lal Dhimra v. The Union of India* (1) considered in detail the nature of posts held by government servants. Dealing with the question of substantive appointment of a person to a temporary post, this Court observed at pp. 842 and 843 of the report:

"The substantive appointment to a temporary post, under the rules, used to give the servant so appointed certain benefits regarding pay and leave, but was otherwise on the same footing as appoint-

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ment to a temporary post on probation or on an officiating basis, that is to say, terminable by notice except where under the rules promulgated in 1949 to which reference will hereafter be made, his service had ripened into what is called a quasi-permanent service "

It may be noted that in that case this Court was considering the effect of Fundamental Rules. In these appeals also we are concerned with those Rules. After dealing with the nature of the various appointments, this Court observed

"The position may, therefore, be summarised as follows:

"In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment dismissed or removed from the service. Except in these two cases, the appointment to a post, permanent or temporary on probation or on an officiating basis or a substantive appointment to a temporary



post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service."

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In *State of Nagaland v G. Vasanth* (1), this Court was called upon to decide the validity of termination of service of a government servant by giving him notice of termination as prescribed in the relevant Rules. Therein, the concerned government servant had been appointed purely on temporary basis. The post to which he was appointed was also a temporary post. Sometime after his appointment that post was converted into a permanent post. But his services were terminated. The question was whether because of the conversion of the post into a permanent post, he ceased to be a temporary government servant. Reversing the decision of the High Court of Assam and Nagaland, this Court held that the fact that the post which he was holding was converted into a permanent post did not confer on him any additional right. His service was terminable by giving him the prescribed notice under the Rules.

A question similar to the one before us came up for consideration before this Court in *State of U. P v Abdul Khalik* (2). The facts of that case were substantially similar to the facts in these appeals. Therein this Court reversing the decision of the Allahabad High Court held that the service of the respondent therein was validly terminated by giving him one month's notice. Speaking for the Court SIKRI, J. (our present Chief Justice) observed:

"The learned Counsel for the State contends that the plaintiff was a temporary servant and his

(1) AIR 1970 SC 587

(2) Civil Appeals Nos 782 and 783 of 1966 decided on 30th April, 1969.

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services were liable to be terminated on a month's notice and the fact that he was holding appointment as temporary substantive does not make the plaintiff a permanent government servant. There is force in this contention. The learned Counsel for the plaintiff was not able to point out any material to show that a person who is appointed temporary substantive can be equated with a permanent government servant. It is clear from the order dated 22nd May, 1956, that only certain posts were made permanent while by the order dated 12th December, 1957, certain other persons were made permanent government servants. The plaintiff cannot claim to be a permanent government servant till he is declared or appointed as such."

In that case this Court had to consider the scope of the rule framed by the Governor under Art. 309 of the Constitution. In our opinion, the ratio of that decision completely covers the point under consideration. That decision was tried to be distinguished on the ground that in that case, only some out of the several temporary posts had been converted into permanent posts, whereas in the cases before us all the temporary posts had been converted into permanent posts. We do not think this difference has any bearing on the ratio of that decision. The ratio of that decision is that a government servant temporarily appointed does not get a right to the post merely because the post held by him is converted into a permanent post.

For the reasons mentioned above, we allow these appeals, set aside the orders of the High Court and dismiss the writ petitions, but in the circumstances of the case, we direct the parties to bear their own costs both in this Court as well as in the High Court.

Before leaving these cases, we would like to impress on the government the hardship that is likely to be caused to the respondents in these appeals. Babu Singh Gaur was appointed as far back as 1949 and Jugal Kishore Bhatt in the year 1948. They have served the Government for a very long time. At this late stage in their lives, it would be very difficult for them to seek other employment. These are eminently fit cases where the Government should find a way to absorb them in its service.

*'Appeals allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Jagmohan Lal and Mr. Justice  
T S Misra*

LACHMAN D. CHABLANI ... 'APPELLANT,

*v.*

UNION OF INDIA, NEW DELHI RESPONDENT.

1973  
March, 8

*Indian Arbitration Act, 1940—Proceedings before Arbitrator—  
Technical rules of evidence, procedure and pleadings—  
Applicability of—Ex-parte proceedings—Request for ad-  
journment—Refusal of—Grounds for.*

An Arbitrator is not bound by the technical rules of evidence, procedure and pleadings. He has, however, to abide by the fundamental principles of natural justice and must act in a manner that will subserve the interest of justice. It is a duty of the Arbitrator to inform a party that he intends to proceed with the reference at a specified time and place. If such a notice is issued and a party fails to appear, the Arbitrator would at liberty to proceed *ex parte* against him.

The granting of an adjournment to a party is within the discretion of an Arbitrator. The discretion should, however, be exercised in a reasonable manner upon proper material

\*While sitting at Lucknow.

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and after considering a party's conduct in the case. The Arbitrator should consider whether the party concerned had shown a sufficient cause for adjournment. What is sufficient cause will depend upon the facts and circumstances of each case. Dilatory conduct of a party to the case and want of due diligence on his part may in a particular case be not sufficient cause for adjournment.

First Appeal from Order No. 35 of 1969 against the judgment and decree dated 13th August, 1966 passed by S N. Harkauli, Civil Judge, Lucknow in Reg. Suit No. 177 of 1965.

*Jagdish Narain*, for the Appellant.

*S. C Mathur*, holding brief of *G. B Lal*, for the respondent

T S. MISRA, J —This appeal is directed against the judgment and decree passed by the Civil Judge, Lucknow, dismissing the objection of the appellant to the award made by the sole arbitrator in a dispute between Sri Lachman D Chablani and the Union of India. That dispute had arisen between the said parties out of a contract for handling and transport of food-grains at Central Storage Depot, Lucknow for the period from 21st July, 1957 to 20th July, 1958.

The present appellant filed an application under s. 8 of the Indian Arbitration Act in the court of the Civil Judge, Lucknow for appointment of an Arbitrator to decide the dispute and give his award. By an order dated 22nd April, 1964 the learned Civil Judge, Lucknow, appointed Sri V Ramaswami Iyer as sole arbitrator in the case and directed the parties to appear before him on 25th April, 1964. The Arbitrator was also directed to file the award within two months. On 25th April, 1964 the present appellant appeared before the Arbitrator and asked for time to file his claim. He was allowed to do so by 11th May, 1964 but having failed to do so he asked for further time which was

allowed. Ultimately he filed his claim before the Arbitrator on 19th May, 1964. The Union of India filed reply to that claim and also filed a counter-claim. The appellant was thereupon given time till 28th September, 1964 to file his reply. He, however, did not do so and moved the court for removal of the Arbitrator on the ground that he had not given his award within two months. He also requested the Arbitrator to stay further proceedings meanwhile. The proceedings were accordingly stayed by the Arbitrator. The proceedings were also stayed by an order of the court. The application of the appellant was, however, rejected by the court on 18th September, 1965 and the Arbitrator was directed to submit his award by 1st December, 1965. The proceedings were then re-started by the Arbitrator. On 21st September, 1965 the Arbitrator directed the present appellant to file a reply within a fortnight and the parties were asked to complete admissions and denials of each other's documents as well as to file draft issues on or before 7th October, 1965. From the order sheet dated 7th October, 1965 maintained by the Arbitrator it appears that the Arbitrator had received a telegram from the present appellant intimating that the appellant was holidaying outstation and requesting to fix a date somewhere in the middle of November. The Arbitrator noted that no reply had been filed by the present appellant against the counter-claim filed by the Union of India and that the parties had not completed admissions and denials of each other's documents and had not filed draft issues. They were, therefore, once again directed to admit or deny each other's documents within a week. The Arbitrator also framed the points for determination in the case. He rejected the request of the present appellant for a long adjournment of the case. The case was, however, adjourned by the Arbitrator for evidence

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of the parties to 21st October, 1965. The parties were also notified and warned that in case of unreadiness or absence of any of them on the said date of hearing the case would be proceeded *ex parte* and disposed of in accordance with law. A copy of this order sheet was sent to the present appellant and to the counsel for the Union of India. In compliance with the order of the Arbitrator the Union of India filed on 19th October, 1965 admissions and denials of those documents which had been filed by the present appellant. The appellant, however, sent a letter dated 20th October, 1965 to the Arbitrator acknowledging the receipt of the Arbitrator's letter of 11th October, 1965 and intimating that he would file a revision application before the High Court against the order of the Civil Judge of 18th September, 1965 whereby his application for removal of the Arbitrator had been rejected. He requested the Arbitrator to fix 31st October, 1965 for attendance of the parties so that he might have a chance to obtain stay order by 30th October, 1965. The Arbitrator, however, took up the case on 21st October, 1965. The Union of India was represented by a counsel. The claimant was, however, absent and none appeared for him. It appears from the order sheet of 21st October, 1965 maintained by the Arbitrator that the Arbitrator had received a telegram on that date from the claimant intimating that he was filing a revision before the High Court and requesting for postponement of the proceedings and for fixing 31st October, 1965. Finding that no sufficient ground for adjournment had been made out the Arbitrator rejected the prayer for postponement of the proceedings and proceeded to record the evidence adduced on behalf of the Union of India. Since the claimant was absent the Arbitrator proceeded *ex parte* against him. On behalf of the Union of India two witnesses were exa-

mined and the case was adjourned for making the award. Ultimately the Arbitrator made his award on 22nd October, 1965. By that award the claim of the present appellant was dismissed. The counter-claim filed by the Union of India was allowed against the present appellant to the extent of Rs 8,178.39. This award was filed in the court and the Union of India prayed that the same may be made a rule of the court. The present appellant filed an objection praying that the award be set aside on the grounds that the Arbitrator had misconducted himself and the proceedings inasmuch as he did not adjourn the case on 21st October, 1965 on receipt of the telegram and did not give sufficient reasonable time to the appellant to appear before him and produce evidence in support of his claim and that no award should have been made in favour of the Union of India for Rs 8,178.39 as no claim had been filed by the Union of India in that behalf and that the Arbitrator being a servant of the Union of India was not a fit person to arbitrate. All these allegations were refuted by the Union of India in its reply. The learned court below, having found that the Arbitrator had not misconducted himself and the proceedings, dismissed the objections of the present appellant and pronounced the judgment in accordance with the award which was made a part of the decree. Against that decision the appellant has preferred this appeal.

The learned counsel for the appellant urged that the Arbitrator had misconducted himself and the proceedings in two ways, namely (1) the Arbitrator should have adjourned the case on 21st October, 1965 and should not have proceeded *ex parte* against the appellant, and (2) the Arbitrator, while making the award,

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did not consider the appellant's documents which had been admitted by the respondent, Union of India and erred in rejecting the claim of the appellant. We shall examine these two grounds in seriatim.

An Arbitrator is not bound by the technical rules of evidence, procedure and pleadings. He has, however, to abide by the fundamental principles of natural justice and must act in a manner that will subserve the interest of justice. It is a duty of the Arbitrator to inform a party that he intends to proceed with the reference at a specified time and place. If such a notice is issued and a party fails to appear, the Arbitrator would be at liberty to proceed *ex parte* against him. If a reasonable excuse for not attending before the Arbitrator is not made out the Arbitrator may make an *ex parte* award. The granting of an adjournment to a party is within the discretion of an Arbitrator. The discretion should, however, be exercised in a reasonable manner upon proper material and after considering a party's conduct in the case. The Arbitrator should consider whether the party concerned had shown a sufficient cause for adjournment. What is sufficient cause will depend upon the facts and circumstances of each case. Dilatory conduct of a party to the case and want of due diligence on his part may in a particular case be not sufficient cause for adjournment. Where a party deliberately absents himself from the hearing despite notice that if he would fail to appear *ex parte* proceedings would be taken against him, the award made would not be bad for misconduct of the Arbitrator. Proceeding *ex parte* in such circumstances cannot be considered to be a misconduct on the part of the Arbitrator. In the present case by an order dated 18th September, 1965 passed by the Civil Judge, Lucknow, the Arbitra-



for was directed to submit his award by 1st December, 1965. Consequently on 21st September, 1965 the Arbitrator directed the present appellant to file his reply within a fortnight to the counter-claim and to complete admissions and denials of each other's documents and to file draft issues on or before 7th October, 1965. It appears that on 7th October, 1965 the present appellant did not appear before the Arbitrator. Instead, he sent a telegram to the Arbitrator intimating that he was holidaying outside. He also did not file his reply to the counter-claim set up by the Union of India nor did he complete the admissions and denials of the documents filed by the Union of India. The Arbitrator rejected the request of the appellant for a long adjournment of the case and adjourned the case for evidence of the parties to 21st October, 1965. The appellant was informed of this date by the Arbitrator vide his letter dated 11th October, 1965. The parties were also warned that in case of unreadiness or absence of any of them on the said date of hearing the case would be proceeded with *ex parte* and disposed of in accordance with law. This letter was received by the appellant on 14th October, 1965 as would be evident from his letter dated 20th October, 1965, a copy of which is at p. 85 in the paper book. By this letter the appellant informed the Arbitrator that he was taking steps for filing a revision and for obtaining stay order from the High Court and requested that the next date for appearance be fixed for 31st October, 1965 to allow him a chance to obtain stay order by about 30th October, 1965. On 21st October, 1965 the Arbitrator took up the case. By that time he had also received a telegram from the appellant intimating that the appellant was filing a revision in the High Court and requesting for postponement of the proceedings and for fixing 31st October, 1965. The Arbitrator noted that if the ap-

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pellant was so minded he should have taken steps expeditiously for obtaining stay order from the High Court but he had not chosen to do so. On the other hand he waited till the date of hearing and sent the telegram. The Arbitrator, therefore, held that it was not a sufficient ground for adjournment of the proceedings. He also observed that the hearing of the case could not be adjourned till 31st October, 1965 which happened to be a Sunday and holiday. The prayer for adjournment was, therefore, rejected and the Arbitrator proceeded *ex parte* against the appellant. The above facts would disclose that the Arbitrator gave reasonable opportunity to the appellant of being heard and of adducing evidence in the case. The appellant, however, deliberately absented himself from the hearing before the Arbitrator. Having found that no sufficient cause had been made out for adjournment the Arbitrator was in our view justified in proceeding *ex parte* against the appellant. This action of the Arbitrator cannot, therefore, be construed as misconduct on the part of the Arbitrator.

The other ground of misconduct referred to above has also no substance. The Arbitrator had framed the following points for determination in the case:

1. Whether the claimant proves his claim to recover from the respondent Rs 39,344 11 or any portion thereof?

2. Whether the respondent proves its right to recover from the claimant Rs.8,178 39 or any part thereof?

3. To what reliefs are the parties entitled?

In regard to the point no 1 the Arbitrator observed that no evidence was forthcoming on behalf of the claimant to prove his claim. Consequently, he found

the point no. 1 against the claimant and in favour of the respondent no. 1. In regard to the point no. 2, after considering the evidence adduced on behalf of the Union of India, the Arbitrator held that the respondent had proved its right to recover from the appellant Rs 8,178.39. It appears from the letter dated 19th October, 1965 from the Union of India to the Arbitrator that the Union of India had admitted two documents out of many filed by the claimant before the Arbitrator. One was the letter dated 27th April, 1958 sent by the appellant to the Assistant Director, Lucknow, and the other was the letter dated 25th January, 1960 sent by the appellant to the Assistant Director, Lucknow. In the letter of 27th April, 1958 the appellant had informed the Assistant Director that certain wagons were unloaded in the presence of the railway officer and the staff of the Assistant Director and the shortage found was reported as well as noted by the railway office. It was stated that the railway authorities were asked to give a short certificate of 52 bags but they refused to do so on account of being private siding. The appellant had, therefore, asked the Assistant Director to make inquiries in the matter and to take immediate action. By the letter of 25th January, 1960 the appellant had informed the Assistant Director that all the work-slips in connection with bills nos 11 and 12 had been submitted along with the summary and he had asked for payment of the pending claims. Admittedly no oral evidence was adduced by the appellant before the Arbitrator to prove his claim. The other documents filed by him were not admitted by the Union of India and were not duly proved. The two letters of 27th April, 1958 and 25th January, 1960 did not by themselves prove the claim of the appellant. The Arbitrator was, therefore, in our view not incorrect in observing that no evidence was forthcoming on

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benefit of the claimant to prove his claim. We, therefore, find no reason to hold that the Arbitrator had misconducted himself and the proceedings.

No other ground was pressed.

In the result the appeal fails and is accordingly dismissed with costs.

*Appeal dismissed*

## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr. Justice N. D Ojha*

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April 5

F C. PASRICHA AND ANOTHER

APPELLANTS,

*v.*

STATE OF U. P AND OTHERS ... RESPONDENTS.

**U. P. (Temporary) Control of Rent and Eviction Act, 1947,**  
*Direction given by Commissioner in 1946 for presentation of  
revisions to the Additional District Magistrate (Judicial)—  
Such presentation valid*

Since the Rent Control Act did not, either by itself or rules framed thereunder, lay down the precise procedure in regard to the presentation of revision, the Commissioner who was the authority entitled to entertain and decide the revisions was within his right to prescribe the procedure in respect of the presentation of revisions. The direction given by the Commissioner in 1946 with regard to the presentation of revisions was valid and enforceable.

Though the Commissioner had no jurisdiction to hear and decide the revisions under the Rent Control Act in 1946, the Commissioner could lay down its practice and procedure and such procedure also governed subsequent jurisdiction conferred upon him. If the Commissioner had indicated the manner and place of presentation of the revisions to it, that procedure would equally apply to the revisional jurisdiction conferred upon the Commissioner afterwards.

Special Appeal no. 744 of 1971 from the judgment and order of B N. LOKUR, J. in Civil Miscellaneous Writ Petition no 5516 of 1970 decided on 10th November, 1971.

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*A. Kumar and S C Khare, for the Appellants*

*Padma Nath Singh, S C, for the Respondents*

S. CHANDRA, J.—The appellants are the tenants of an accommodation situate at Mussoorie. Respondents 4 to 6 who are the landlords of the premises, applied before the Rent Control and Eviction Officer for permission to file a suit for the ejectment of the appellant on the ground that they needed the accommodation for their personal use. On 17th May, 1969 the Rent Control and Eviction Officer passed an order granting the requisite permission. Aggrieved, the appellants filed a revision before the Commissioner, Meerut. The Commissioner held that the revision was barred by time and on that ground he dismissed it. Aggrieved, the tenants instituted a writ petition in this Court. A learned single Judge was not impressed by the various submissions raised in the writ petition and dismissed the writ petition. Hence the present appeal.

It appears that the appellants presented a revision application in the Court of the Additional Magistrate (Judicial), Dehra Dun on 16th June, 1969. The reader of the Court accepted the revision and after making a note of presentation transmitted it by post to the Court of the Commissioner, Meerut. The office of the Commissioner at Meerut made the usual report regarding the limitation, the sufficiency of the court-fee and the requisite copy of the order appealed against and notice was issued to the revisionists. When the revision came up for hearing before the Commissioner an objection was raised that the revision was bar-

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red by time. The Commissioner held that the memorandum of revision was received in the office of the Court on 4th July, 1969, that is to say, much beyond the prescribed thirty days period of limitation. He refused to entertain an application for condonation of delay as well as the point whether the tenants were entitled to the exclusion of time requisite for obtaining the copy of the order of the Rent Control and Eviction Officer.

It appears that before the Commissioner the appellants had filed an affidavit of Shri M. M. L. Khanna, Chief Reader of the District Magistrate, Dehra Dun. In this affidavit it was stated that the Commissioner had issued a letter to the District Magistrates, including the District Magistrate, Dehra Dun, allowing all of them to accept the appeals and revisions on behalf of the Commissioner, Meerut Division. According to these instructions the reader of the District Magistrate was accepting appeals and revisions to be presented to the Commissioner, including revisions under the Rent Control Act. The Commissioner did not disbelieve this affidavit. A perusal of his order shows that he avoided dealing with it directly. The Commissioner observed that in the year 1946 the Rent Control Act did not contemplate the hearing of any revision by a Commissioner and, therefore, the acceptance of revisions at the district level and their presentation to the Commissioner was only a figment of the imagination of Shri Khanna. We do not read these observations to the effect that the Commissioner had not issued instructions to the District Magistrates directing them to accept the revisions as deposed by Shri Khanna. Adverting to this affidavit, the learned single Judge observed that there was no prevailing practice of entertaining the revisions by the Additional District Magistrate (Judicial), Dehra

Dun. We thus find that there is no finding disbelieving the affidavit of Mr Khanna. On the contrary, the fact that the appellants were led by information of a prevailing practice to present the revision before the Additional District Magistrate (Judicial), the fact that the Court of the Additional District Magistrate (Judicial) accepted the revision and transmitted it to the Commissioner at Meerut, coupled with the fact that the office of the Commissioner at Meerut accepted the presentation of the revision at Dehra Dun to be proper, show that the affidavit of Shri Khanna was true on facts. It appears that the Commissioner had authorised the District Magistrate to receive revisions meant for him. By so authorising, the Commissioner was only indicating the place and the manner of presentation of the revisions. Since the Rent Control Act did not either by itself or rules framed under it lay down the precise procedure in regard to the presentation of the revision, the Commissioner who was the authority entitled to entertain and decide the revisions was within his rights to prescribe the procedure in respect of presentation of the revisions. The direction given by the Commissioner in 1946 with regard to the presentation of revisions was valid and enforceable.

In accordance with those directions the courts of the District Magistrate were validly accepting the presentation of the revisions meant for the Commissioner. In this view the presentation of the revisions to the court of the Additional District Magistrate (Judicial), Dehra Dun was valid institution thereof. In the present case the revision was presented on 16th June, 1969 within thirty days of the order passed by the Rent Control and Eviction Officer on 17th May, 1969.

It was urged that the Commissioner had no jurisdiction to hear or decide the revisions under the Rent

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Control Act in the year 1946 This jurisdiction was conferred on the Commissioner for the first time by an amendment of 1952 That may be so. In *National Sewing Thread Co. Ltd v James Chadwick and Brothers* (1), it was held that a court can lay down its practice and procedure and such practice and procedure also governed subsequent jurisdiction conferred upon that Court If the Commissioner had indicated the manner and place of presentation of the revisions to it, that procedure would equally apply to the revisional jurisdiction conferred on the Commissioner afterwards.

Our attention was invited to a decision of a single Judge in *Seth Bal Gopal Das v. State of U. P.* (2). In that decision it was recognised that the Commissioner could authorise the Additional District Magistrate to receive revision applications on his behalf but it was held that there was no evidence to prove that there was any such practice The case is clearly distinguishable on facts. The materials on record of our case do show that there was a prevailing practice in regard to the presentation of revisions to the Court of the Additional District Magistrate (Judicial), Dehra Dun. It appears that the Court of the Additional District Magistrate, Dehra Dun had been adopting this practice under the instructions issued by the Commissioner in 1946 The decision in *Seth Bal Gopal Das's* case (2) was also from Dehra Dun In that case the revision was presented before the Additional District Magistrate The conduct of the office of the Commissioner and the acceptance of the presentation of the revision by the court of the Additional District Magistrate corroborate the prevailing practice In our opinion, it is clearly established that at Dehra Dun there

(1) A.I.R. 1953 S.C. 857.

(2) 1973 A.L.J. 120.



was a prevailing practice of the presentation of the revisions meant for the Commissioner. Even revisions under the Rent Control Act were presented before the Additional District Magistrate (Judicial). If such was the prevailing practice and if a litigant follows it the principle that a litigant should not suffer by the act of the Court will be applicable. In *Kedar Nath Marwari v. Jai Berham* (1), it was held that one of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court' is used, it does not mean properly the act of primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

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In *Zafaruddin Ahmad v. Madan Mohan* (2), a Division Bench of this Court held that where the applicant had done all he could do within the period of limitation, his right could not be defeated simply because that Court itself delayed the making of the direction which was sought by an application made within time. These principles are well applicable to the instant case. Led by the prevailing practice the appellants presented the revision within time to the proper court. They had done all that was required of them; they should not be made to suffer even if it ultimately be found that the practice was invalid. In our opinion, the presentation of the revision was valid. The revision was presented within limitation. It was not liable to be dismissed on the ground that it is time-barred. In this view it is unnecessary to decide whether the appellants were entitled to the exclusion of requisite time for obtaining a copy of the order of the Rent

(1) A.I.R. 1922 P.C. 269.

(2) 1960 A.L.J. 878

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Control and Eviction Officer or they were intitled to the benefit of s 14 of the Limitation Act We leave those questions open.

In the result, the appeal succeeds and is allowed The judgment of the learned single Judge is set aside and the writ petition is allowed The order of the Commissioner is quashed and the matter is sent back to him for decision of the revision on merits and in accordance with law The parties may, however, bear their own costs

*Appeal allowed*

### CRIMINAL MISCELLANEOUS

*Before Mr Justice K B. Srivastava and Mr Justice Onkar Singh\**

1978  
May, 10

ASHFAQUE HUSAIN

APPLICANT,

*v*

STATE OF UTTAR PRADESH

AND ANOTHER

OPPOSITE-PARTIES

**Constitution of India, Arts 5, 7, 9, 10 and 11—Citizenship Act, 1955, s 9, Foreigners Act, 1946, s 9 and Foreigners (Internment) Order, 1962, Para 5—Detention under—Detenu proves himself to be the Indian citizen—Detention prior to the determination of his nationality as a foreigner under section 9(2) of Citizenship Act—Legality of**

Once a person is found to be a citizen of this country under Art 5 of the Constitution of India and that citizenship is not negatived by Art 7, he will be deemed to continue to be such a citizen, until he has acquired the nationality of another State The question whether or not he has so acquired a foreign nationality is a question of fact and can be determined by the Central Government or the Prescribed Authority under section 9 of the Citizenship Act

A person cannot be arrested or detained as a foreigner under para 5 of the Foreigners (Internment) Order if he establishes,

\* While sitting at Lucknow.

to start with, that he is a citizen of this country, and that the arrest and detention can only follow and not precede the determination of his nationality as a foreigner under s 9 of the Citizenship Act.

Criminal Miscellaneous Case no 264 of 1973 under s 491, Criminal Procedure Code

*G H Nigvi*, for the Applicant

*B N Katju*, for the State

K B SRIVASTAVA, J —This application under Art 226 of the Constitution and under s 491 of the Code of Criminal Procedure for a writ of *habeas corpus* made by Ashfaq Hussain, at present detained in District Jail, Lucknow, under an order of detention passed on 26th May, 1972 by the civil authority under para 5 of the Foreigners (Internment) Order, 1962, raises only one question, namely, whether on proof of the fact that the detenu is an Indian citizen the civil authority can still detain him under the aforesaid para, treating him as a foreigner, without the determination of his nationality as a foreigner by the Prescribed Authority under sub-s (2) of s 9 of the Citizenship Act, 1955

Before dealing with this question of law, it would be necessary to narrate the facts in brief. It is not disputed that the detenu Ashfaq Hussain was born at Lucknow on 12th August, 1912, nor is it disputed that he migrated to Pakistan on 3rd January, 1951 and entered India sometime in 1954 after obtaining a Pakistani passport no 177275 on 21st February, 1953 and an Indian visa, Category B, No 02417 on 15th September, 1954. He was initially arrested on 20th May, 1972 under s. 14, Foreigners Act, 1946 which detention was subsequently regularised by the impugned order passed on 26th May, 1972.

The term "foreigner", as defined by s 2(a) of the Foreigners Act, means a person who is not a citizen of

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India Under s 9 of this Act, if in any case any question arises with reference to the Act or any order made or direction given thereunder, whether any person is or is not a foreigner, the onus of proving that such person is not a foreigner shall, notwithstanding anything contained in the Indian Evidence Act, lie upon such person. That being so, the Legislature has placed the burden of proof upon the person proceeded against to establish that he is a citizen of India, that is to say, not a foreigner. This follows necessarily from the words used in s 9 of the Citizenship Act; and if any authority is needed, it is furnished by the decision of their Lordships of the Supreme Court in *Abdul Sattar v The State of Gujarat* (1).

This leads us to the question whether the detenu has been able to establish that he is a citizen of this country. Arts 5, 9, 10 and 11 of the Constitution become relevant in this regard. Under Art 5, at the commencement of the Constitution, every person who has his domicile in the territory of India and—

(a) was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

The three conditions specified in cls (a), (b) and (c) are alternative and not cumulative, and so if any one of those conditions is satisfied, a person would be deemed to be a citizen of India if he had his domicile in the territory of India on 26th January, 1950. It would thus appear that the basic condition is that the person must have his domicile in India on the date when the

(1) A.I.R. 1965 S.C. 810.

Constitution came into force. If that condition is satisfied, the person must show further that he was either born in India, or either of his parents was born in India, or he had been ordinarily resident in India for not less than five years immediately preceding such commencement. The detenu was born in India on 12th August, 1912. He migrated to Pakistan on 3rd January, 1951, practically a year after the commencement of the Constitution. Under Art 5, therefore, he must be deemed to be a citizen of this country. Now the question is whether this citizenship stands negatived under Art. 7. That Article says that notwithstanding anything under Art 5, a person who has, after the 1st day of March, 1947 migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. It is settled law that the migration to which Art 7 refers must have taken place between 1st March, 1947 and 26th January, 1950, See *State of Madhya Pradesh v Peer Mohammad* (1) and *Abdul Sattar's case* (2). Ashfaq Husain did not migrate to Pakistan between the aforesaid two dates but on 3rd January, 1951. That being so, he did not lose his citizenship which had accrued to him under Art. 5 by the force of Art 7. Art 9 deals with persons voluntarily acquiring citizenship of a foreign State. It provides that no person shall be a citizen of India by virtue of Art 5 if he has voluntarily acquired the citizenship of a foreign State. Under Art 10 of the Constitution, every person who is or is deemed to be a citizen of India shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen. Art 11 empowers Parliament to regulate the right of citizenship by law and empowers it to make any provision with respect to the acquisition and determination of citizenship. According to the constitutional pro-

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(1) AIR, 1968 SC 645

(2) AIR 1965 SC 810

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visions, therefore, once a person is found to be a citizen of this country under Art 5 and that citizenship is not negatived by Art 7, he will be deemed to continue to be such a citizen, until he has acquired the nationality of another State. The question whether or not he has so acquired a foreign nationality is a question of fact. Now, who is competent and has the jurisdiction to decide such a question of fact, namely, the Central Government or any prescribed authority, or a Court of law, or some or all of them. It is in this connection that s 9(2), Citizenship Act, comes up for consideration. S 9(1) says that any citizen of India who by naturalization, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of the Citizenship Act, voluntarily acquired the citizenship of another country shall upon such acquisition, or as the case may be, such commencement, cease to be a citizen of India. S. 9(2) states that if any question arises as to where, when, or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf. Reading Art 9 of the Constitution and s 9 of the Citizenship Act, in a case where there is proof that a person is, to start with, a citizen of India and it is alleged by the State that he has lost his citizenship by reason of acquiring the nationality of a foreign State, the question of invoking s 9 of the Citizenship Act will at once arise. To put it in a different manner, a person must first show, to start with, that his case falls under Art 5 and not under Art 7 and it is then alone that Art 9 of the Constitution or s 9 of the Citizenship Act will become relevant. See *Ibrahim v State of Rajasthan* (1), *Government of Andhra Pra-*

*desh v. Mohd. Khan* (1), *Izhar Ahmad Khan v. Union of India* (2) and *Abdul Sattar's case* (3). These decisions apply to a case where there is evidence that a person is a citizen and there is a counter-case that in spite of his original citizenship, he has lost it by acquisition of the citizenship of another country. In such a case, the nationality has to be determined by Central Government or the Prescribed Authority under s. 9, Citizenship Act

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To summarise the legal position, we may state as follows:

(1) In order to be a citizen of India, a person must have had his domicile in India, as on 26th January, 1950.

(2) In addition to having his domicile, as stated above, he must also fulfil one of the three conditions specified in cls (a), (b) and (c) in Art 5

(3) If the conditions of Art 5 are fully complied with, he should not have migrated from India to Pakistan between the period 1st March, 1947 and 26th January, 1950 and if he has migrated he will not be a citizen notwithstanding Art. 5, and

(4) If Art 5 fully applies to him, and he does not fall within the mischief of Art 7, he will be a citizen of India; and if in such circumstances a dispute arises whether he is a foreigner or a citizen, that question must be decided under s. 9, Citizenship Act by the Central Government or by the Prescribed Authority before any action can be taken.

The learned Government Advocate has argued that a 'civil authority', acting in exercise of his power under para 5 of the Foreigners (Internment) Order, 1962

(1) A.I.R. 1962 S.C. 1778.

(2) A.I.R. 1962 S.C. 1052.

(3) A.I.R. 1965 S.C. 810.

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can provisionally determine the nationality of a person as a foreigner, on the basis of the evidence and material placed before it, and can lawfully order his arrest and detention in jail, and in that contingency, his order will be valid and shall subsist so long as the nationality has not been finally determined under s. 9, Citizenship Act by the Central Government or the prescribed authority. He further argued that the determination of the 'civil authority' will be based on the subjective satisfaction and that question is not and cannot be justiciable. The upshot of the argument is that a 'civil authority' can arrest and detain a person on his suspicion and subjective satisfaction that a person is a foreigner and not a citizen of India and that person cannot challenge this decision in a Court of Law. He invited our attention to two factors in this connection. He referred to para 8 of the Foreigners (Internment) Order in the first place. Para 8 says that the civil authority may arrest without any warrant any foreigner whom, it reasonably suspects of having acted, or acting or of being about to act, with intent to assist a country at War with or committing external aggression against India, or in a manner prejudicial to the public safety or to the safety of any building or machinery. Para 8 does not say that the civil authority can come to a provisional conclusion that a person is a foreigner. Under this para, he can arrest (1) if he is reasonably satisfied; (2) that a person has acted, is acting, or is about to act, (3) with intent to assist a country at War with or committing external aggression against India, or in a manner prejudicial to the public safety or to the safety of any building or machinery, and (4) when that person is a foreigner. Para 8, or for that matter, any other para, does not confer jurisdiction on him to determine the nationality. He can arrest only if the person is a foreigner and not other-



wise. If he arrests a citizen, his order would be illegal and liable to be quashed. The fact that a person is a foreigner is a condition precedent. The Foreigners (Internment) Order has been passed under s. 3 of the Foreigners Act and, therefore, wherever the word 'foreigner' has been used, it must carry the same meaning as defined by s. 2(a) of the Foreigners Act, that is to say, that the person arrested or detained is not a citizen of India. If he is able to show, as the detenu has done in this case, that he is a citizen of India, he cannot be treated as a foreigner, unless the question whether or not he has acquired the nationality of another country, is determined by the authority competent to do so. Again, when the statute confers that power and jurisdiction on the Central Government or to a prescribed authority, it can be exercised only by them and not by an intruder. The 'civil authority' is not the Central Government, nor is it the prescribed authority. It cannot be permitted to usurp the powers of the Central Government or of the prescribed authority. The second argument, to which we will now refer, is equally untenable. Our attention was invited to the decisions of their Lordships of the Supreme Court in *Rameshwar v The District Magistrate* (1) and *P Mukherjee v State of West Bengal* (2) and on their basis it was argued that the satisfaction of the detaining authority to which s. 3, Preventive Detention Act, refers is subjective and not objective satisfaction, and so is not justiciable. Therefore, it would not be open to the detenu to ask the Court to consider the question as to whether the said satisfaction of the detaining authority can be justified by the application of objective tests. The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of law, the adequacy of the material on

(1) AIR, 1964 SC. 884.

(2) AIR 1970 SC 852.

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which the said satisfaction purports to rest also cannot be examined in a court of law, except where some of the grounds furnished to the detenu are found to be vague or irrelevant or when the order of detention is challenged on the ground of *mala fides*. These decisions are with regard to preventive detention under the Preventive Detention Act and have no analogy to or bearing on a detention under the Foreigners (Internment) Order. The preventive detention is founded on satisfaction with respect to any person that with a view to prevent him from acting in any manner prejudicial to (a) defence of India, the relation of India with foreign powers or the Security of India, or (b) the security of the State or the maintenance of public order, or (c) the maintenance of supplies and services essential to the community, or (d) if satisfied with respect to any person who is a foreigner within the meanings of the Foreigners Act that with a view to regulate his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary to make an order directing that such person be detained, the detaining authority may pass an order for his arrest and detention. The satisfaction of the detaining authority, in the contingencies aforementioned is a subjective satisfaction and has not been made justifiable. The Foreigners (Internment) Order does not speak of any satisfaction. Even under the Preventive Detention Act, the foreigner must be a foreigner within the meaning of the Foreigners Act and that is not a matter of subjective satisfaction. What is a matter of subjective satisfaction, is the question of regulating his continued presence etc. These decisions, in our view, therefore, have no bearing on the case. On the other hand, there are several pronouncements of their Lordships of the Supreme Court to the effect that a person cannot be arrested or detained as a foreigner if he estab-

lishes, to start with, that he is a citizen of this country, and that the arrest and detention can only follow and not precede the determination of his nationality as a foreigner. In *Akbar Khan v Union of India* (1), their Lordships held that s 9(2), Citizenship Act, bars the jurisdiction of the civil court to try the question mentioned in s 9(2) because it says that those questions shall be determined by the prescribed authority *which necessarily implied that it cannot be decided by anyone else*. In *Government of Andhra Pradesh v Mohammad Khan* (2), their Lordships made the following observations.

"The question as to whether a person has lost his citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner. It may be that if a passport from a foreign Government is obtained by a citizen and the case falls under the impugned Rule, the conclusion may follow that he has acquired the citizenship of the foreign country; but that conclusion can be drawn only by the appropriate authority authorised under the Act to enquire into the question. Therefore, there is no doubt that in a case where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this country, it is essential that the question should be first considered by the Central Government.

The decision of the Central Government about the status of the person is the basis on which any further action can be taken against him. Therefore,

(1) A I R. 1952 S C. 70.

(2) A I R. 1962 S C 1778,

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we see no substance in the argument that the orders of deportation . . . should be sustained even without an inquiry by the Central Government about their status "

In *Abdul Sattar's* case (1), their Lordships of the Supreme Court held thus :

"So, whenever a question as to whether a person has acquired the citizenship of a foreign State falls to be considered, the jurisdiction to decide that question vests exclusively in the Government of India if the question about the acquisition of citizenship of a foreign country has not been determined, in respect of any person, by the Government of India . . . , it would not be open to any State to prosecute the said person on the basis that he has lost his citizenship of India and has acquired the citizenship of a foreign country. A decision by the Government of India is a condition precedent in that behalf "

To sum up, since the detenu has established before us that he is a citizen of this country, and since his status as a foreign national has not been determined by the Central Government, we must treat him at the moment as a citizen of this country and must quash the impugned order.

We, accordingly, direct that he shall be released forthwith unless he is wanted in connection with some other matter.

*Application allowed.*

## CIVIL REFERENCE (F. B.)

*Before Mr. Justice R L Gulati, Mr Justice H N Seth  
and Mr Justice C S. P Singh*

TRILOK CHAND

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NUE AUTHORITY

.. RESPONDENT.

*Indian Stamp Act, 1899, s 2(16)(c) and Art 35(b) of Sch. I-B  
of U P Stamp (Second Amendment) Act, 1958*

The bid-sheet as such cannot be treated as lease of the tolls, as no concluded enforceable contract between the parties emerged by mere signing the bid-sheet. It cannot also be treated as an agreement to let out the tolls, inasmuch as it does not evidence any such enforceable contract. There is no attestation of this document by a witness. It would as such not answer the description of a "bond". It also does not appear that it is "an instrument" as defined in s 2(14) of the Act. It is also not "a conveyance" for no movable or immovable property has been transferred by the bid-sheet. The document as such is not chargeable to duty under the Act.

Stamp Act Reference no 207 of 1971 under s. 57 of the Indian Stamps Act.

*S J. Hyder, for the Applicant*

*S. C., for the Respondent*

C S. P SINGH, J:—The Chief Controlling Revenue Authority, has under s 57 of the Stamp Act referred, the following questions for our opinion.

"1. Whether the document (a copy of which is Ann. I to this reference) is an agreement to let tolls and is included within the meaning of a lease as given in s 2(16)(c) of the Stamp Act read with Art. 35 thereof and is chargeable under Art. 35(b) of Sch I-B of U. P Stamp (Second Amendment) Act, 1958 with a duty of Rs.195.

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2. In case the answer to the above question is in the negative, is the document (Ann. I) chargeable with stamp duty under any other Article of the Stamp Act, and if so what?"

The Town Area Committee, Modinagar decided to auction the rights to realise fee of tonga stand and rickshaw licence of Modinagar, Ghaziabad, district Meerut for the year 1960-61, and it held an auction on the 20th March, 1960. This auction was conducted by the officers of the Town Area Committee and the reserved price for sale of these right was fixed at Rs 10,000 (*See* Ann I). Bids were made by various persons but the bid of Tirlok Chand, the applicant was the highest, being of Rs 6,200. The signatures of the various bidders were taken on the bid-sheet, and after the bid was closed there was an endorsement to the effect that the bid was closed, as there was no bid higher to the applicant. This bid-sheet was put up before the Chairman of the Town Area Committee on the 22nd March, 1960 i.e. on the 3rd day of the bid, and he also signed the bid-sheet. Thereafter, Tirlok Chand exercised the right of collecting fee of Tonga stand and Rickshaw licence within the Town Area.

The Inspector of Stamp and Registration, Meerut Circle, who had been appointed as Collector for the purpose of s. 40 of the Stamp Act by U P Government notification no. C-4135/X—525, dated 20th August, 1928 and r. 325 of the U P Stamp Rules framed under notification no. M-598/X—503, dated 25th March, 1942 examined this document and treating it to be an agreement to let tolls, chargeable with stamp duty under Art. 35(b), Sch I-B read with s. 2(16)(c) of the Stamp Act, impounded it, and imposed deficit duty of Rs.195 and penalty of Rs.30. The matter thereafter came up before the Chief Controlling Revenue Autho-

rity, which has now made the present reference.

It will be convenient to extract the relevant provisions of the Stamp Act. S 2(16) of the Stamp Act reads as under:

"2(16). *Lease*—'lease' means a lease of immovable property, and includes also—

(a) a *patta*;

(b) a *kabuliyat* or other undertaking in writing, not being counterpart of a lease, to cultivate, occupy or pay or deliver rent, for immovable property;

(c) any instrument by which tolls of any description are let;

(d) any writing on an application for a lease intended to signify that the application is granted "

Art. 35(b), Sch I-B is as under:

"35. Lease, including a under-lease or sub-lease and any agreement to let or sub-let.

.....

(b) Where the lease is granted for a fine or premium or for money advanced and where no rent is reserved."

It will be seen that any instrument by which tolls of any description are let is a lease. It is not denied that the transaction in dispute relates to tolls. The controversy, however, is as to whether the bid-sheet is a lease as defined in s. 2(16) of the Stamp Act.

Now even if the document is not a lease but an agreement to let the tolls, it would be still taxable under Art. 35 of Sch. I-B of the Act with the same duty as a lease. The question that arises for determination, is as to whether the bid-sheet can be said to be a lease

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or failing that an agreement to let. If it does not come within either of these two categories, it cannot be taxed under Art 35, Sch I-B of the Act

The Standing Counsel has urged that the bid-sheet is an instrument by which tolls have been let out. S 2(14) defines 'an instrument' as including a document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. We may assume that the bid-sheet is an instrument, but that by itself would not make it a lease, because the tolls should have been let out by that instrument. Before, however, any tolls can be said to be let out, there must be an agreement. An agreement postulates the making of a proposal by a person and the acceptance of the said proposal by the other. After proposal has been accepted, an agreement between the parties is created. In the present case, it appears from the bid-sheet that the reserved price fixed by the Town Area Committee was Rs 10,000. This meant that the officials of the Town Area Committee, who auctioned the rights, could not finalize auction unless the reserved price had been bid at the auction. In the present case, the bid offered was much less than the reserved price. This being so, the officials of the Town Area Committee who acted as auctioneers could not possibly accept the proposal made on behalf of the applicant which consisted of an offer to pay Rs 6,200 only. The mere fact that the highest bidder, and the officers of the Town Area Committee who conducted the auction, but their signature on the auction bid, would not alter the position in law, for the signature on the bid-sheet by these two parties were only for the purposes of giving authenticity to the auction proceedings which took place on that date. It is, however, contended that even if it can be said that the bid-sheet



did not mature into a lease on the 20th March, 1960, it became such, on the 22nd March, 1960, when the Chairman signed the same in token of his approval of the bid. We are not impressed by this argument too. In the first place it is doubtful as to whether the Chairman of the Town Area Committee had any authority to enter into a contract on behalf of the Town Area without a requisite resolution being passed by the Town Area Committee. It is however not necessary to express any final opinion on this matter for otherwise too, the mere signing of the bid-sheet by the Chairman, Town Area Committee, would not convert it into a binding contract between the applicant and the Town Area Committee. It has been seen that the bid-sheet only contains a memo of the highest bids made by the various persons who participated in the auction. It does not contain any terms or conditions relating to.

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- 1 The maximum rate of tolls chargeable by the applicant
- 2 The duration of the lease
3. The mode, manner and time of the payment of the auction money.
- 4 The consequences of any breach on the part of the applicant of the terms of the agreement.

In the absence of some of these conditions the agreement, if any, that came into existence would be unenforceable on the ground of vagueness. The bid-sheet as such cannot be treated as a lease of the tolls in question, as no concluded enforceable contract between the parties emerged by the mere signing of the bid-sheet. It cannot also be treated as an agreement to let out the tolls, inasmuch as it does not evidence

1973 any such enforceable contract. A similar view has  
 TRILOKCHAND been taken by the Madras High Court in the case of  
 v. *The Rajanagram Village Co-operative Society v. P.*  
 CHIEF *veerasami Mudaley* (1) and also in the case of *Sir*  
 CONTROLLING *Rameshwar Singh Bahadur v. Shaik Kitab Ali* (2) by  
 REVENUE the Patna High Court. We are in respectful agree-  
 AUTHORITY ment with the views expressed in these cases. The  
 C. S. P. Board of Revenue, which is the Chief Controlling  
 Singh, J. Revenue Authority, has in its referring order referred  
 to two decisions of this Court one, in the case of *Amar*  
*Nath Khanna v. State Government* (3) and in the case  
 of *Mumtaz Ali v. Town Area Committee, Bharwari* (4),  
 on the basis of which it took the view that the docu-  
 ment in question would be dutiable under Art 35,  
 Sch. I-B of the Act. None of the cases referred, deal  
 directly with the question raised in the present refer-  
 ence. The answer to the first question must, there-  
 fore, be returned in the negative.

Coming now to the second question. The docu-  
 ment in question not being chargeable as a lease, the  
 question arises as to whether it is chargeable under any  
 other item of the Schedule or the Act. The only  
 possible item under which it could be brought is  
 "bond" as defined in s 2(5) or a "conveyance" as defin-  
 ed in s. 2(10) of the Act. Cls (a) and (c) of s. 2(5) are  
 clearly inapplicable. We are thus left with cl. (b) of  
 that sub-section which reads:

"(b) any instrument attested by a witness and  
 not payable to order or bearer, whereby a person  
 obliges himself to pay money to another."

Cl (b), however, only applies if the document in ques-  
 tion is (1) an instrument, and (2) attested by a witness.  
 Now the document in question, which is a bid-sheet of

(1) A.I.R. 1951 Mad. 829.

(2) A.I.R. 1926 Pat. 487.

(3) Civil Misc. Writ no 345 of 1956 decided on 21st March, 1961.

(4) 1970 A.L.J. 114.

the auction held on 20th March, 1960 has been signed by all the bidders who were parties to the auction and the officer concerned, who conducted the auction. There is no attestation of this document by a witness. It would as such not answer the description of "a bond". It also does not appear that it is "an instrument" as defined in s 2(14) of the Act. The bid-sheet itself, did not create any right or liability in the applicant till such time that the offer was not accepted by the Town Area. The applicant could withdraw the bid before its acceptance, and in that event, there would be no liability on him to pay the money bid at the auction. It did not also create any right, for till such time that the bid was accepted, the applicant could not enforce the offer. The position might have been otherwise, in case the terms and conditions of the auction had stipulated that in the event of a bidder resiling from his bid, he would be liable to pay damages, for if that were so, the bid would create a liability and the document in question would then be "an instrument". There is, however, nothing on the record to warrant such a conclusion. It is also not "a conveyance" for no movable or immovable property has been transferred by the bid-sheet, and a conveyance can only be executed after an agreement, and in the present case, it has been seen that no agreement had come into existence. The document as such is not chargeable to duty under the Act.

We, therefore, answer the first question in the negative and the second question by holding that the document is not chargeable with stamp duty under any other Article of the Stamp Act. The applicant is entitled to costs which we assess at Rs.200.

*Questions answered.*

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## APPELLATE CIVIL

*Before Mr. Justice S Chandra and Mr Justice  
K N Seth*

STATE OF U P. AND OTHERS

APPELLANTS,

v.

ATMA RAM CHAUHAN AND OTHERS

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**Indian Medicine Act, 1939, s 39(4)**—*Ayurveda graduates registered as medical practitioners—Authorised to do medico-legal work—The order prohibiting them is bad*

When the Indian Medicines Act expressly entitles practitioners registered under the Indian Medicine Act, to do medico-legal work and to appear as an expert, the State Government has no power to contravene that provision. The impugned order passed by the Civil Surgeon, Saharanpur, is clearly violative of the provisions contained in s 39(4) of the Act.

Special Appeal no 1088 of 1970 from the judgment and order of PAREKH, J, in Civil Miscellaneous Writ no 3158 of 1968, dated 14th October, 1970

*Standing Counsel*, for the Appellant

*Mohd Iqbad*, for the Respondents.

S CHANDRA, J. —The State of Uttar Pradesh and the authorities of Medical Health Services have come up in appeal against the judgment of a learned single Judge quashing an order passed by the Civil Surgeon, Saharanpur on 30th May, 1968. By this order the Civil Surgeon directed all the Medical Officers Incharge of Zila Parishad Dispensaries in the district of Saharanpur that they were not authorised to do medico-legal work at the dispensary as they were not fully qualified for this work.

It is not disputed that all the Medical Officers of the Zila Parishad Dispensaries, who are respondents before

us, being Ayurveda graduates were registered medical practitioners within meaning of Indian Medicine Act, 1939. S 39(4) of that Act provides

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"39(1) . . . . .  
(4) A registered practitioner shall be entitled s Chandra,  
to— J

(a) sign or authenticate a birth or death certificate required by any law or rule to be signed or authenticated by a duly qualified medical practitioner;

(b) sign or authenticate a medical or physical fitness certificate required by any law or rule to be signed or authenticated by a duly qualified medical practitioner;

(c) given evidence at any inquest or in any court of law as an expert under s 45 of the Indian Evidence Act 1872 on any matter relating to medicine, surgery or midwifery'

S 41(2) of the Act provides that the registered practitioners shall have the same privileges as the medical practitioners registered under the U P Medical Act, 1917, have under the U P Excise Act, 1910 or any other Act for the time being in force. It is apparent from s 39(1) that the expression "legally qualified medical practitioner" or duly qualified medical practitioner or any word importing that a person is recognised by law as a medical practitioner or member of medical profession shall in all Acts in force in Uttar Pradesh and in all Central Acts in so far as such Acts relate to any of the matters specified in List II or List III in the Seventh Schedule to the Constitution be deemed to include a registered practitioner.

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It is thus clear that the Ayurvedic practitioners, who have been granted the requisite diploma and who were deemed to be the registered practitioners are also deemed to be the legally qualified medical practitioners within meaning of Indian Medicine Act. They are entitled to do the various acts as well as to the same privileges as the medical practitioners registered under the U. P. Medical Act, 1917.

It appears that the Government received some complaints against the competence of Ayurvedic practitioners who were acting as Medical Officers of the Zila Parishad Dispensaries. In October 1966 the Government constituted a committee and charged it with the duty of examining whether such practitioners should be permitted to do medico-legal work and to submit its report within a fortnight. In November 1966, the committee submitted its report after examining the various curriculars and the courses prescribed by the various Ayurvedic Colleges. It found that the Ayurvedic practitioners were deficient in qualifications. The State Government appears to have accepted this report and to have issued instructions to the Civil Surgeons of the various districts to see that the Ayurvedic practitioners are not permitted to do medico-legal work. In the context of these instructions the Civil Surgeon, Saharanpur passed the impugned order dated 30th May, 1968 prohibiting the medical officers of the Zila Parishad Dispensaries from doing any medico-legal work. It is not disputed that the medico-legal work includes giving of evidence at any inquest or in any court of law as an expert under s 45 of the Indian Evidence Act on any matter relating to medicine, surgery or midwifery.

The question that arises for consideration is whether the State Government or its Executive Officers are en-

titled to pass orders prohibiting the registered medical practitioners from doing the work which they had been expressly authorised to do by virtue of their registration under the Indian Medicines Act. We are clear in our mind that the orders of the State Government cannot override the provisions of legislative enactments. When the Indian Medicines Act expressly entitles these registered practitioners to appear as an expert, the State Government has no power to contravene that provision. The impugned order passed by the Civil Surgeon, Saharanpur is clearly violative of the provisions contained in s 39(4) of the Act.

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It was urged that under para. 422 of the U P Medical Manual as well as under the notification dated 16th November, 1946, issued by the State Government under the District Boards Act, the Medical Officers Incharge of the Zila Parishad Dispensaries are under the personal control of the Civil Surgeons. That may be so. But in the guise of control, the Civil Surgeon cannot deprive the registered practitioners of their statutory right.

The impugned order is a general order operating on all medical officers irrespective of their individual capacity to do medico-legal work. Such a general order violates s 39(4) of the Act. The learned single Judge was justified in quashing this order.

The appeal has no substance and is accordingly dismissed with costs.

*Appeal dismissed*

# CIVIL REFERENCE (F. B.)

*Before Mr Justice R L Gulati, Mr Justice H N  
Seth and Mr Justice C S P. Singh*

INDODAN MILK PRO-  
DUCTS LTD

APPLICANT,

COMMISSIONER OF SALES TAX,

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RESPONDENT.

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**U. P. Sales Tax Act, 1948, s 4(a) and Central Sales Tax Act,  
s 8(2 A)—Notification dated 16th February, 1965—Condensed  
milk not taxable under the Central Sales Tax Act**

Turnover of the sale of condensed milk is completely exempt under s 4(a) of the U P Sales Tax Act from payment of sales tax and as such the dealer is not liable to pay Central Sales Tax with regard to it as provided under s 8 of the Central Sales Tax Act

Sales Tax Reference no 492 of 1971 connected with  
Sales Tax Reference no 495 of 1971

H N SETH, J. —At the instance of Messrs Indodan Milk Products Ltd, a dealer in condensed milk, etc., the Additional Judge (Revisions), Sales Tax referred the following question, in respect of the assessment years 1964-65 and 1965-66 to this Court for opinion

“Whether in the facts and circumstances of the case, condensed milk is taxable under the Central Sales Tax Act in view of the notification nos S T - 911/X, dated 31st March, 1956 and S T -776/X—900(16)-64, dated 16th February, 1965 of the U. P. Sales Tax Act and read with s 8(2-A) of the Central Sales Tax Act?”



While hearing the references, a Division Bench of this Court felt that the case of *Nestlé Products India Ltd v Commissioner of Sales Tax* (1) in which it has been held that condensed milk is not milk within the meaning of s 4(a) of the U P Sales Tax Act, requires reconsideration. Accordingly it referred these cases to a Full Bench and that is how they have come up before us.

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During the assessment years in question, the dealer sold condensed milk in soldered tins and other cans in the course of inter-State trade. The Sales Tax Officer brought the turnover in respect of such sales to tax under the Central Sales Tax Act. The dealer then filed appeals against the assessment orders and contended that when during the course of inter-State trade it sold condensed milk in soldered tins and other cans, it did not sell the same in sealed containers. Sale of condensed milk, in such circumstances, was totally exempt from payment of sales tax as per notifications issued by the U P Government. In the circumstances it was not liable to pay Central Sales Tax also on such turnover, as provided in s 8(2-A) of the Central Sales Tax Act. The Assistant Commissioner, Judicial who heard the two appeals, did not go into the question whether in this case the dealer sold milk in sealed containers or not. He held that the turnover of sale of condensed milk was generally not exempt under various notifications issued by the U P Government and as such the same was liable to be taxed under the Central Sales Tax Act. The dealer then filed two revision applications before the Additional Judge (Revisions) which were dismissed and the two assessment orders passed by the Sales Tax Officer as confirmed in appeals were upheld. Subsequently at the instance of the assessee the learned Judge, Revision referred the aforementioned question for the opinion of this Court in both the cases.

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S 8 of the Central Sales Tax Act makes provision for payment of sales tax in respect of sales made by a dealer in the course of inter-State trade Sub-s (2-A) runs thus:

“Notwithstanding anything contained in sub-s 1-A of s 6 or sub-s (1) or sub-s (2), if under the Sales Tax Act law of the appropriate State, the sale or purchase as the case may be, of any goods by a dealer is exempt from tax generally or is subject to tax generally at a rate which is lower than 3 per cent whether called a tax or a fee or by any other name, the tax payable under this Act on his turnover in so far as the turnover or any part thereof relates to the sales of such goods shall be nil or as the case may be, shall be calculated at a lower rate

*Explanation*—For the purpose of this sub-section a sale or purchase of goods shall not be deemed to be exempt from tax generally under the sales tax law of the appropriate State, if under that law, it is exempt only in specified circumstances or under specified conditions or in relation to which the tax is levied at specified stages or otherwise than with reference to the turnover of the goods”

S 4(a) of the U P Sales Tax Act provides that no tax shall be payable on the sale of water, milk, salt newspaper and motor spirit This section further authorises the State Government to issue notifications exempting the turnover of sale of any other good from sales tax According to s 4(b) sales made by A-11 India Spinners Association or Gandhi Ashram, Meerut or its branches or such other persons as the State Government may from time to time notify, shall be exempt from payment of sales tax on such conditions and on payment of such fee, if any, not exceeding Rs 8,000 annually as may be specified in the notification.

Acting under s 4 of the U P Sales Tax Act, the State Government issued a notification no S T -911/X, dated 31st March, 1956 directing that with effect from 1st April, 1956 the goods mentioned in List II thereunder shall alone be exempt from payment of tax. Item no 10 of this list mentioned milk and milk products such as Chhena, Dahi, Khoa, butter and cream but excluding (1) products sold in sealed containers, and (2) sweetmeats, as items exempt from payment of sales tax. In the result, turnover of a dealer in respect of milk, milk product other than those sold in sealed containers or sweetmeats is exempt from payment of sales tax under the U P Sales Tax Act. Subsequently, by notification no S T -3506/X, dated 10th May, 1956, the State Government amended the notification dated 31st March, 1956 and further excluded ghee, one of the milk products from item no 10 of that notification as an item turnover of which is exempt from payment of sales tax. The State Government issued yet another notification no S T -776/C—900(16)-64, exercising its power under s 3-A(1) of the Sales Tax Act, providing for single point taxation in cases of sale of butter and cream. The position that emerges as a result of these notifications and the provisions contained in s 4 of the U P Sales Tax Act that the sale of milk is completely exempt from payment of sales tax in all circumstances. The turnover in respect of milk products excepting butter cream and ghee is exempted from sales tax if these products are sold otherwise than in sealed containers, so far as sales tax on the turnover of two of the milk products i.e. butter and cream is concerned it is payable at a single point as mention in notification no S T -776/C—900(18)-64.

Learned counsel for the dealer contends that both under s 4 of the U P Sales Tax Act and the notifications mentioned above, the turnover in respect of sale

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of milk is completely and generally exempt from payment of sales tax. Condensed milk is nothing but milk in concentrated form. Turnover of its sales is, therefore, not liable to Central sales tax as provided in s 8 (2-A) of the Central Sales Tax Act. Even if it be assumed that condensed milk is a milk product, turnover of its sales otherwise than in sealed container is generally exempt from sales tax under the abovementioned notification and as the assessee in this case did not sell condensed milk in sealed containers its turnover was generally exempt from tax under the U P Sales Tax Act and consequently it was not liable to pay Central sales tax as provided under s 8(2-A) of the Central Sales Tax Act.

Learned Standing Counsel did not contest the position that under the U P Sales Tax Act turnover of milk is generally exempt from sales tax and as such its sale during the course of inter-State sale whether in sealed container or otherwise would not be liable to Central sales tax as provided in s 8(2-A) of the Central Sales Act. He, however, contends that condensed milk is not milk within the meaning of the term as used in s 4(a) of the U P Sales Tax Act and the notification mentioned above. According to him, it is a milk product like Khoa etc as held by this Court in the case of *Nestles Product India Ltd v Commissioner of Sales Tax* (1). Notification dated 31st March, 1956 and subsequent notifications do not generally exempt the turnover of condensed milk from tax under U P Sales Tax Act and therefore the dealer is liable to pay Central sales tax in respect thereof.

The assessee can be held liable to pay Central sales tax in respect of the turnover of its sale of condensed milk in course of inter-State trade, only if it is held that condensed milk is not milk but it is a milk pro-

duct and that the turnover of its sale is generally not exempt from tax under the U P Sales Tax Act. Since elaborate arguments have been addressed to us on both aspects of the question, I propose to deal with each of them.

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The expression 'milk' as used in s 4 of the U P Sales Tax Act has not been defined in the Act. This word, therefore, has to be given a meaning which is given to it in common parlance and has to be understood in the same sense in which it is understood by those who deal in this commodity. In common parlance a fluid secreted by the mammary glands of a mammalia which is used by human beings as food is known as milk. In India milk derived from mammary glands of cow and buffalo is widely used as food for human consumption and is understood to be milk. Main question that arises for consideration in this case therefore is whether when cows and buffaloes milk is condensed it still continues to be milk or gets converted into a milk product within the meaning of the notification no ST-911/X, dated 31st March, 1956.

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It cannot be disputed that in this country the secretion obtained from the mammary glands of cows and buffaloes in its natural form is considered to be milk. It is also clear that even after the milk obtained in natural form has been subjected to some process resulting in some change in its constitution it does not necessarily cease to be milk. With the improvement of dairying in this country, the milk obtained in natural form is subjected to various processes before it is delivered to consumers, e.g. after fresh milk is collected and brought to various dairies, it is subjected to a process known as pasteurization with a view to remove bacterias from it so that it may be preserved for a long-

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er period After milk has been subjected to pasteuriza-  
 tion, it cannot be said that the product remains in all  
 respects identical to milk obtained in its natural form.  
 It is not disputed that the pasteurized milk is sold in  
 the market as milk and would be covered by the ex-  
 pression 'milk' as used in s 4 of the U P Sales Tax  
 Act Similarly milk which is issued from dairies is very  
 often skimmed and a part of its fat contents taken out  
 When the milk is skimmed its constitution undergoes  
 a change but the product which remains after skim-  
 ming continues to be milk, and is sold as such Quite  
 often various sweetmeat seller, after obtaining fresh  
 milks heat it and after adding some thickening agent  
 sell it for drinking purpose Some time before putting  
 the aforementioned commodity for sale, they take out  
*malai* from it The process of heating results in reduc-  
 tion of milks water content and the act of removing  
*malai* reduces its fat contents In spite this change  
 in the constitution of milk, obtained in a natural form,  
 what is sold by the sweetmeat sellers is invariably con-  
 sidered to be milk In the circumstances, it is obvious  
 that the expression milk as used in s 4(a) of the U P  
 Sales Tax Act is not confined only to milk obtained  
 and sold in its natural form Merely because milk ob-  
 tained in natural form is subjected to some processing  
 resulting in the reduction either of its water or fat c  
 tents, it does not necessarily cease to be milk

It is quite possible that when milk is processed a  
 commodity which is entirely different from milk and  
 which cannot be identified as such may be obtained.  
 The commodity so obtained can be described as "Milk  
 Product" Its composition and use will be basically  
 different from that of milk obtained in natural form  
 Common examples of such products are Ghee, Chena,  
 cream, butter and Khoa etc All these products are all

obtain by subjecting natural milk to a process but then in quality, constitution and nature of their use they are basically different from milk.

In one sense, whenever a commodity is subjected to a process and some change is brought about in its constitution, it can be said that the resultant commodity is the product of the original commodity. For example when groundnut oil is refined it may be said that refined groundnut oil is the product of the raw oil subjected to the process of refining. But, in such a case even though groundnut oil has been subjected to process its essential qualities and use continue to be the same and it still continues to be groundnut oil in refined form. In my opinion the expression 'milk product' as used in notification no 911/X, dated 31st March, 1956 has not been used in this sense. If the commodity obtained as a result of processing of milk continues to retain the essential quality of milk as commonly understood, its sale will be exempt from payment of sales tax under s 4(a) of the U. P. Sales Tax Act and it cannot be made taxable under a notification issued for purposes of exempting the turnover of certain sales from tax. In my opinion, the expression 'milk product', in the aforesaid notification, has been used in the sense of a product obtained from milk which is essentially different from it and is not used as milk.

Encyclopaedia Britannica, while commenting upon "evaporated milk and condensed milk", states as follows:

"Of the concentrated milks on the market, the most important in volume is evaporated milk. This is whole milk that has been concentrated in a ratio of approximately 2 1 to 1 0 sealed in cans, and sterilized by heating at 240°F for 15 to 20 minutes. It may contain added vitamin D and a

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fraction of a per cent of stabilizing salts. It has a cooked flavour and a brownish colour. The evaporated milk produced in the United States is marketed at retail mostly in cans. . . .”

Similarly under the heading Dairy Products it is stated

“Removal of water by evaporation under controlled procedures is the basis for the preparation of sweetened condensed milk, evaporated milk, dried milk and sterile concentrated milk. If water equal in volume to that removed is added to these latter products, milk with essentially the same food value as the original product is obtained.”

This, in my opinion, shows that condensed milk is nothing but milk in concentrated form which is obtained by evaporating water from milk in a fluid state, and thereafter some sugar or preservatives is added to it. The article obtained as a result of evaporation of water from fluid milk remains milk and after adding back corresponding quantity of water, it acquires the shape of milk obtained in natural form and is used for the same purpose for which milk is used. Generally milk is condensed or is concentrated so as to preserve it for a longer period and for facilitating its marketability. At no stage the condensed milk loses the essential characteristics of milk. The very name ‘condensed milk’ suggests that it is milk in condensed form.

Learned counsel for the State argued that while exempting the turnover of the sale of milk, salt, newspaper etc from sales tax, the State Government intended to grant exemption in respect of such articles which are commonly used by an average man. It did not intend to grant exemption in respect of such sophisticated articles like condensed milk which is beyond the reach of common man and is used by persons belonging to the higher stratum of society. I am unable to



accept this submission. It is true that the State Legislature exempted the turnover of milk etc from the levy of sales tax as they are articles of common use, but it cannot be said that the Legislature did not want to grant that exemption in respect of the same article if it was to be used by persons belonging to higher stratum of society or if it was so adopted by changing its form that it may be preserved for a longer period and its marketing facilitated. If, therefore, the fluid milk, after it is concentrated and converted into condensed milk, remains milk, it will be no argument to say that the Legislature did not intend exemption in respect of such sophisticated articles.

Learned Standing Counsel then contended that generally condensed milk is considered to be a milk product, different from milk from which it is obtained. Turnover of its sale, therefore, is not exempt under s 4(a) of the U. P Sales Tax Act. In support of this argument he relied upon the following passage appearing in Encyclopaedia Britannica.

"Cows' milk and its products have become important articles of commerce, most of the research on chemistry, bacteriology and technology of milk being carried out in relation to it. Of the principal milk products butter, cheese and ice cream are discussed elsewhere, evaporated, condensed and dried milks are discussed in this article."

He urged that this shows that even the author of Encyclopaedia realised that condensed milk is a milk product, different from the milk from which it is obtained. Similarly in Prevention of Food Adulteration Act as it stands today, while prescribing the standard for various food stuffs, the standard for condensed milk, has been provided for under a heading different from that in

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which the standard for fresh milk has been provided for. This, according to learned counsel, clearly indicates that generally condensed milk is considered to be a milk product different from milk.

In this connection, learned Standing Counsel also relied upon a notification no S T -922/X—900(21)-69, dated 31st March, 1970, published in the *Uttar Pradesh Gazette, Extraordinary*, dated 1st April, 1970 wherein the State Government, in exercise of its powers under s 3-A of the U P Sales Tax Act, 1948 provided for single point taxation on the turnover of the sale of condensed milk sold in sealed or tinned containers. He urged that this notification clearly indicates that till 31st of March, 1970 it was considered that condensed milk was taxable at multiple point on the footing that it was not milk, but a milk product different from milk and that Legislature did not intend that condensed milk should be understood as covered by the expression "Milk" as used in s 4 of the Sales Tax Act.

After giving my anxious consideration to these arguments, I find myself unable to accept them. In my opinion the Encyclopaedia Britannica describes condensed milk as a milk product in the sense in which skimmed or toned milk can be said to be product of milk obtained as a result of processing of milk obtained in its natural form. A reading of the passage appearing in the Encyclopaedia Britannica as a whole indicates that in the opinion of the author, condensed milk is merely concentrated form of milk which is essentially not different from natural milk. Similarly, when Prevention of Food Adulteration Act classifies condensed milk under the heading "Milk Product" instead of the heading 'Milk' it does not have the effect of changing the essentials of condensed milk and to convert it into a milk product in the sense in which the expression has

been used in s 4(a) of the U P. Sales Tax Act So far as the Government notification no 922/X—900(21)-69, dated 31st March, 1970, relied upon by the learned Standing Counsel is concerned, it cannot have the affect of changing the scope of expression 'milk' as used in s 4(a) of the U P Sales Tax Act That is a notification issued by the State Government It cannot be used for determining the scope of expression 'Milk' as used by the Legislature in s 4(a) of the U P Sales Tax Act All that this notification shows is that after decision of this Court in the case of *Nestles Product India Ltd v Commissioner of Sales Tax* (1), the Government thought that condensed milk was a milk product different from milk and as such it made provision for its sale being taxed at a single point The opinion of the Government cannot be equated with the opinion of the State Legislature

In this connection, the decision of the Supreme Court in the case of *Tungbhadra Industries Ltd, Karnool v Commercial Tax Officer, Karnool* (2) may be cited with advantage. In that case, the Supreme Court had to interpret r 18(2) of the Madras General Sales Tax (Turnover and Assessment) Rule, which ran thus:

"Every such registered manufacturer of groundnut oil will be entitled to a deduction under cl. (k) of sub-r (1) of r 5, equal to the value of the groundnut and/or Kernel, purchased by him and converted into oil and cake if he has paid the tax to the State on such purchases . . . ."

Tungabhadra Industries Ltd, purchased groundnut and kernels within the State and manufactured groundnut oil, refined oil as well as hydrogenated oil The question that arose for consideration by the Supreme Court was whether the petitioner Tungabhadra Industries was entitled to deduct the value of the groundnut used

(1) 14 S.T.C. 606.

(2) 11 S.T.C. 827.

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by it in the manufacture of refined and hydrogenated oil. It was urged before the Supreme Court that the deduction under r 18(2) could be granted only in respect of sale of groundnut oil, i.e. the groundnut oil in the form in which it had been extracted from out of kernels. So far as the claim of deduction in respect of refined oil was concerned, the Supreme Court observed as follows:

“When raw groundnut oil is converted into refined oil, there is no doubt processing, but this consists merely in removing from raw groundnut oil that consistent part of the raw oil which is not really oil. The elements removed in the refining process consist of free fatty acids, phosphotides and unsaponifiable matter. After the removal of this non-oleic matter therefore the oil continues to be groundnut oil and nothing more. The matter removed from the raw groundnut oil not being oil cannot be used after separation, as oil or for any purpose for which oil could be used. In other words, the processing consists in the non-oily content of the raw oil being separated and removed, rendering the oily content of the oil 100 per cent. For this reason refined oil continues to be groundnut oil within the meaning of rr 5(i)(k) and 18(2) notwithstanding that such oil does not possess the characteristic colour, or taste, odour etc of the raw groundnut oil.”

It may be noticed that in the instant case also, condensed milk is obtained by reducing or taking out the water contents of the milk obtained in its natural form. The matter removed from the milk in the natural form (water) is not milk and cannot be used after separation as milk or for any purpose for which milk can be used,

The processing consists in the water contents of the milk being reduced resulting in milk in concentrated form

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Learned Judges of the Supreme Court not only held that refined groundnut oil was groundnut oil, but they went further and held that hydrogenated oil also was groundnut oil and as such deduction with regard to it claimed under r 18(2) was admissible, notwithstanding the fact that while processing refined oil and converting it into hydrogenated oil the form and quality of the oil changed and it underwent a chemical change. The end product (hydrogenated oil) continue to be groundnut oil. In this connection the learned Judge observed as follows:

"To be groundnut oil, two conditions have to be satisfied. The oil in question must be from groundnut and secondly the commodity must be 'oil'. That the hydrogenated oil sold by the appellants was out of groundnut not being in dispute the only point is whether it continues to be oil even after hydrogenation. Oil is a chemical compound of glycerine with fatty acids, or rather a glycerine of a mixture of fatty acids—principally oleic, linoleic, steric and palmitic—the proportion of the particular fat varying in the case of the oil from different oilseeds and it remains a glyceride of fatty acids even after the hardening process, though the relative proportion of the different types of fatty acids undergoes a slight change. In its essential nature therefore no change has occurred and it remains an oil—a glyceride of fatty acids—that it was when it issued out of the press."

This judgment of the Supreme Court, therefore, clearly shows that merely because as a result of processing

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some change takes place in the form of commodity and its non-essential constituents are reduced or removed, it does not follow that the commodity so obtained is different from the commodity which was subjected to processing. By no stretch of imagination can it be said that water is an essential constituent of milk and if its proportion is reduced, milk ceases to be milk.

The view that a mere change in form of a commodity does not necessarily convert it into a different commodity finds support from another Supreme Court decision in the case of *State of Madhya Bharat v Hira Lal* (1) wherein the dealer purchased scrap iron and iron plates from outside and after converting them into bars, flats and plates in his mills sold them in the market. The Supreme Court held that according to item no 39 of notification dated 24th October, 1953, no tax was payable on the sale of goods which could be described as iron and steel. According to it, the dealer was entitled exemption under that notification as scrap iron purchased by him was processed for convenience of sale. The raw materials were only re-rolled to give them attractive and acceptable form. They did not, in processing lose their character as iron and steel. Bars, flats and plates sold by him were iron and steel, exempted under the notification.

In the case of *State of Gujarat v Sakarwala Brothers* (2), the Bombay Sales Tax Act, 1959, entry no 47 in Sch. A exempted the sale of sugar as defined in item no 8 of First Schedule to the Central Excises and Salt Act, 1944, from payment of sales tax. According to the First Schedule of the Central Excises and Salt Act, 1944 "sugar" means any form of sugar containing more than 90 per cent of sucrose. The question that arose for consideration before the Supreme Court was whether

(1) 17 S T C. 313 (S C).

(2) 19 S T C. 24 (S C)

"batasa", "harda" and "alchidana" fall within the definition of 'sugar' in entry 47 of Sch A to the Bombay Sales Tax Act, 1959 and whether their sales were exempt from the payment of sales tax. Their Lordships came to the conclusion that "batasa", "harda" and "alchidana" were various forms of sugar and that they were exempt for payment of sales tax. It cannot be denied that "batasa", "harda" and "alchidana" are prepared from sugar. In preparing these articles the form of sugar undergoes a change but not in its essential characteristic and the ultimate product so obtained continues to be sugar. Similarly, in the case before us, by evaporating water from milk its essential characteristic and constituent remains the same and what is obtained is milk in condensed or concentrated form.

Learned Standing counsel contended that in s 4(a) expression used is milk and not milk in any form. In the circumstances, the observations made by the Supreme Court in *State of Gujarat v Sakarwala Brothers* (1) cannot support the dealer. I am unable to accept this submission. As stated earlier, there is no justification limiting the meaning of expression milk as used in s 4(a) of the U. P. Sales Tax Act to milk obtained in its natural form only. In my opinion, the expression milk in s 4(a) means milk in any form just as the expression sugar in entry 47 of Sch A to the Central Excises and Salt Act, 1944 means sugar in any form. I am, accordingly, of opinion that the aforementioned Supreme Court cases support the view that condensed milk is milk within the meaning of s 4(a) of the U. P. Sales Tax Act.

Learned Standing Counsel placed reliance upon the following cases. *State of Travancore Cochin v. Shan-nugha Bilas Cashewnut Factory* (2) wherein it was held

(1) 19 S T C 24 (S C)

(2) A I R 1958 S C 339

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that raw cashewnut becomes commercially different commodity when as a result of processing they are converted into edible Kernels, *A H Abduls and Co v State of Madras* (1) wherein it was held at p. 1733 that raw hides and skins and tanned hides and skins are commercially different commodity as by applying preservative a change is brought in raw hides and skins and a different commercial commodity as a result of processing emerge, *Devi Das Gopal Krishna v State of Punjab* (2) wherein it was held that by processing scrap iron loses its identity and becomes road steel section and a new marketable commodity is obtained, and *Messrs Goyal Industries (P) Limited v Commissioner, Sales Tax, U. P., Lucknow* (3) wherein it was held that water and ice were different commodities although chemically composition of both remains the same.

It may be that milk in its natural form may be commercial commodity different from milk in condensed form but as stated earlier there is no justification for holding that s. 4(a) grants exemption for the sale of milk only when it is sold in the same condition in which it is obtained from the mammary glands of cow and buffalo. The exemption under s. 4(a) has been granted on sale of milk in any form and therefore even if various forms of milk are different commercial commodities, the exemption given in s. 4 equally applies to all those commodities. I am accordingly of opinion that the cases relied upon by the learned Standing counsel do not go to show that condensed milk is not milk within the meaning of s. 4(a) of the U. P. Sales Tax Act.

(1) A.I.R. 1964 S.C. 1729.

(2) 20 S.T.C. 430.

(3) 1971 U. P. Tax Cases 697.



In this view of the matter, I am of opinion that the turnover of the sale of condensed milk is completely exempt under s 4(a) of the U. P Sales Tax Act from payment of sales tax and as such the dealer is not liable to pay Central sales tax with regard to it as provided under s 8 of the Central Sales Tax Act

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I now proceed to consider whether in case it is held that condensed milk is not covered by the expression milk as used in s 4(a) of the U. P Sales Tax Act and that it is a milk product as contemplated by sale tax notification no. 911/X, dated 31st March, 1956, can it be said that for purposes of s 8(2-A) of the Central Sales Tax Act, its sale is exempt from tax generally under the U. P. Sales Tax Act Relevant portion of notification no S.T-911/X, dated 31st March, 1956 reads as follows:

"In exercise of the powers conferred by s 4 of the U P Sales Tax Act, 1948, as amended from time to time, and in supersession of all previous notifications granting any exemption under the said section relating to any persons or class of persons or goods, class of goods not being goods specified in List I below, the Governor of Uttar Pradesh is pleased to direct that with effect from 1st April, 1956, the List II hereunder shall alone be exempt from payment of tax

## LIST I

1. . . . .
2. . . . .
3. . . . .
4. . . . .
5. . . . .
6. . . . .

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MILK PRO		
DUCTS LTD	9	.
"		
COMMISSION-	10	Milk and milk products such as Chhena,
ER OF SALES		Dahl, Khoa, butter and cream but excluding (1)
TAX, U P		product sold in sealed containers and (2) sweet-
H N. Sethi,		meats "
J.		

According to this notification the turnover of milk products is exempt from payment of sales tax, only when the products are sold otherwise than in sealed containers i.e. if they are sold in sealed containers their sale would not be exempt from sales tax. Explanation added to s 8(2-A) runs thus:

"For the purpose of this sub-section a sale or purchase of goods shall not be deemed to be exempt from tax generally under the sales tax law of the appropriate state if under that law it is exempt only in specified circumstances or under specified conditions or in relation to which the tax is levied at specified stages or otherwise than with reference to the turnover of the goods"

According to this explanation, if sale of goods is under the sales tax law of the appropriate state, exempt from payment of tax in specified circumstances or under specified conditions, it would not be deemed to be exempt from tax generally within the meaning of sub-s (2-A) of s 8. In this case I find that sale of milk products is exempt from payment of sale tax only when it is sold otherwise than in sealed containers. The exemption granted in respect of sale of milk product under U P Sales Tax Act is therefore conditioned by the circumstance that it is sold otherwise than in sealed containers. It follows that the notification no 911/X, dated 31st March, 1956 specifies the circumstances or

the conditions (sold otherwise than in sealed containers i.e. loose) in which alone the sale of milk products will be exempt from sales tax. Accordingly, I am of opinion that in view of the explanation added to s 8(2-A) of the Central Sales Tax Act, it cannot be said that notification dated 31st March, 1956, generally exempts the sale turnover of milk products from tax, within the meaning of that section.

Learned counsel for the dealer contended that so far as sale of milk products otherwise than in sealed containers is concerned, it invariably is exempt from payment of sale tax. According to him, notification no 911/X, dated 31st March, 1956 does not, in any circumstance or condition, permit the sale of milk product when sold otherwise than in sealed containers, to be taxed. The turnover of such sale, therefore, should be considered to be generally exempt from tax within the meaning of s 8(2-A) of the Central Sales Tax Act. I am unable to accept this submission. According to s 8(2-A) what has to be seen is whether the sale of a particular commodity as such is generally exempt from sales tax. If the argument advanced by the dealer's counsel is accepted it will mean that whenever under the sales tax law of the state turnover of a commodity has been exempted from tax on certain conditions it can always be said that the commodity sold in that condition is generally exempt from sale tax. That is precisely what has been avoided by the explanation added to s 8(2-A) of the Act. As stated earlier, under the notification dated 31st March, 1956 milk product is exempt for payment of sale tax only when it is sold otherwise than in sealed containers. The condition that for claiming exemption it should, be sold otherwise than in sealed container is a specific condition which has been mentioned in the notification issued under the U. P. Sales Tax Act.

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 J

In support of his contention, learned counsel for the dealer relied upon a decision of the Madhya Pradesh High Court in the case of *Commissioner of Sales Tax v Kapoor Dori, Nirwar and Co* (1). In that case the State Government issued a notification and exempted sales of *nirwar* by a dealer registered under the 1958 Act from payment of sales tax, for a period of one year. Learned Judges of Madhya Pradesh High Court observed that the expression "exempt only in specified circumstances or under specified conditions" occurring in the explanation to sub-s (2-A), means such circumstances or conditions the non-existence or non-performance of which precludes the grant of exemption, so that if those circumstances do not exist or those conditions are not performed, then the sales of goods cannot be exempted from tax even if they are effected by a class of dealers to whom exemption is granted. Even if it be taken that these observations correctly state the law on the subject, they do not support the submission made by the learned counsel for the dealer. In that case, for payment of tax, *nirwar* dealers had been classified into classes i.e. (1) dealer registered under the 1958 Act, and (2) those who were not so registered. So far as the dealers who belonged to the 1st of the two classes were concerned, their turnover was under no circumstance and in no condition was liable to tax and therefore it was held that sale by them was generally exempt from tax within the meaning of s 8(2-A) of the Central Sales Tax Act. In the instant case, however, I find that if the same dealer sells the milk product in a sealed container he will have to pay sales tax in respect of such turnover but if he sells the same milk product otherwise than in a sealed container his turnover would be exempt from tax. In the circumstances the right to claim the exemption depends upon existence or non-

(1) 22 S.T.C. 152.

existence of a condition or non-performance of an act, which may preclude the grant of exemption to the dealer before us. Facts of Madhya Pradesh High Court case, therefore, are clearly distinguishable from the facts of the present case.

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In view of the aforesaid discussion, I am of opinion that if it is held that condensed milk is not milk, but it is a milk product, it would not be possible to hold that its sale is generally exempt from payment of sales tax under the provisions of the U P Sales Tax Act. Since, however, I have come to the conclusion that condensed milk is in fact milk and not a milk product, as contemplated by notification no S T -911/X, dated 31st March, 1956, the turnover of its sale is generally exempt from payment of sales tax under s 4(a) of the U P Sales Tax Act. Such a turnover is therefore also not liable to Central sales tax as provided in s 8(2) of the Central Sales Tax Act.

In the result, I answer the question referred to this Court in negative and in favour of the dealer who will be entitled to receive one set of cost of these references which is assessed at Rs 300.

GULATI, J.:—I agree

C. S P SINGH, J.:—I agree

*Question answered*

## APPELLATE CIVIL

*Before Mr. Justice Jagmohan Lal and Mr Justice  
Prem Prakash\**

JAMALUDDIN AND OTHERS

.. APPELLANTS,

1978

July, 24.

v.

ASIMULLAH AND OTHERS

.. RESPONDENTS

*Specific Relief Act, 1963, s. 6(3), (4) and Code of Civil Pro-  
cedure, 1908, s. 47—Appeal—Decree passed under, s. 6—  
Execution of—Objection against—No appeal lay against*

*\*While sitting at Lucknow.*

1963  
JAMALUDDIN  
v  
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*the order passed under section 47—Remedy by way of regular suit if, open*

In view of the provisions contained in sub-s (3) of s 6 of the Specific Relief Act, 1963, no appeal shall lie from an order or decree passed in suit instituted under that section either on the regular side or on the execution side

*Bij Lal v Mahadeo* (1) approved

A regular suit to challenge the order passed under section 47, C P C in execution of the decree passed under section 6 of the Specific Act would not be barred. To that extent the provisions of the general law contained in s 47(1) shall be deemed to have been overridden by special law, contained in sub-s (4) of s 6 of the Specific Relief Act

Code of Civil Procedure, 1908, s 47—*Words and Phrases*—“Not by a separate suit”—*Meaning of—Specific Relief Act, 1963, s 6(4).*

The words “not by a separate suit” refer to a suit of the nature in which the decree under execution itself has been passed. They do not refer to a suit of a different nature which is permitted by sub-s (4) of s 6 of the Specific Relief Act

Second Execution Decree Appeal No 3 of 1969 against the judgment and decree dated 26th November, 1968 passed by G D SRIVASTAVA, District Judge, Sultanpur in Civil Appeal No 12 of 1968

*Mohd Husain and Abid Ali*, for the Appellants

*H D Srivastava, Umesh Chandra and S P Pathak*, for the Respondents

JAGMOHAN LAL, J :—This second appeal arising out of execution proceedings was referred by a learned single Judge of this Court to a Bench on account of some important point involved therein. The brief facts giving rise to this appeal were that the respondents Azimullah and others brought a suit under s 6 of the Specific Relief Act, 1963 against Jamaluddin and others appellants for possession over plot no 545/3 measuring nine biswas. That suit was decreed. The decree-holders put that decree in execution and obtained pos-

session over a piece of land describing it to be plot no. 545/3. An objection under s. 47 of the Code of Civil Procedure was filed by the judgment-debtors alleging that the land on which possession was actually delivered to the decree-holders was constituted by plot no. 545/1 which was not the subject-matter of that suit under s. 6 and it belonged to them independently of the decree passed in favour of the respondents. The execution court issued a commission and after taking into consideration the relevant facts came to the conclusion that the land over which possession had been delivered to the decree-holders was the same in respect of which the decree had been passed and which was numbered as 545/3 though subsequently its number was changed to 545/1. After this finding the objection under s. 17 raised by the judgment-debtors was dismissed.

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The judgment-debtors then filed an appeal before the District Judge which was dismissed and thereafter they filed this second appeal.

A preliminary objection was raised that this second appeal, and actually the first appeal also, was not competent in view of the provisions contained in sub-s. (3) of s. 6 of the Specific Relief Act which provides that no appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

Execution proceedings are continuation of the suit and an order passed under s. 47 relating to the execution of a decree is also an order or decree to which the provisions of sub-s. (3) shall be applicable. The same view was taken by a learned single Judge of this Court in *Brij Lal v. Mahadeo* (1) after considering several other cases of this Court and other High Courts.

(1) AIR 1954 All. 19.

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Reference may be made to *Harakh v Ram Sarup* (1), *Din Dayal v Patriakhan* (2), *Narayan Permanand v Nagindas Bhaidas* (3), *Kanai Lal Ghose v Jatindra Nath Chandra* (4), *Thomas Souza v. Ghulam Moidin Beari* (5), *Partab Singh v. Nathu* (6), *Munshiram v. Amind Chand* (7) and *Zakarali v Israr Hussain* (8). These decisions with which we respectfully agree support the conclusion that in view of the provision contained in s 9 of the Specific Relief Act, 1877 (corresponding to s 6 of the Specific Relief Act, 1963) no appeal shall lie from an order or decree passed in a suit instituted under that section either on the regular side or on the execution side. This is clear from the language of sub-s (3) of s 6 itself which, in our opinion, would include even an order passed on the execution side in relation to a decree passed in that suit. That being so, the first appeal filed before the District Judge as well as the second appeal in this Court against the order of the execution court are incompetent. The present appeal is liable to be dismissed on this preliminary ground alone.

It was, however, argued by the learned counsel for the appellants that the appellants would be without a remedy in view of the provisions contained in sub-s (1) of s 47, if they are not allowed to challenge the correctness of the order passed by the execution court in appeal. Sub-s. (1) of s 47 lays down that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. In our opinion the words "not by a separate suit" refer to a suit of the nature

(1) I L R XII All 579  
(3) I L R XXX Bom 113  
(5) I L R XXVI Mad 438  
(7) A I R 1928 Lah 539

(2) I L R XVIII All 481  
(4) I L R XLV Cal 519  
(6) A I R, 1922 Lah 416  
(8) A I R 1947 Nag 53.



in which the decree under execution itself has been passed. They do not refer to a suit of a different nature which is permitted by sub-s (4) of s 6 of the Specific Relief Act, 1963 itself. This sub-section lays down that nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof. If the decree that is passed under s 6 is itself open to challenge by a regular suit permitted by sub-s (4), there is no reason to think that an order passed in connection with that decree on the execution side under s 47, C P C would be a final order and not open to challenge by a similar regular suit. Of course, a suit under s 6 of the Specific Relief Act cannot be filed to challenge an order passed under s. 47(1) of the Code of Civil Procedure. But a regular suit to challenge that order or for that matter to challenge the decree itself passed under s 6 of the Specific Relief Act, would not be barred. To that extent the provisions of the general law contained in s 47(1) shall be deemed to have been overridden by the special law contained in sub-s (4) of s 6 of the Specific Relief Act. So it is not correct to say that the appellants would be without any remedy if their appeal against the order passed by the execution court under s 47(1) is not entertained.

The appeal is accordingly dismissed on the preliminary point. In the circumstances of the case we make no order as to costs.

*Appeal dismissed.*

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v  
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## CRIMINAL REVISION

Before Mr Justice K. B. Srivastava\*

ISHWAR CHAND AND OTHERS . . APPLICANTS

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v

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STATE OF U P

OPPOSITE-PARTY

Code of Criminal Procedure, 1898, s 439—Revision filed directly in the High Court—Propriety of

The long standing practice of normally rejecting revisions filed directly in High Courts is bounded on sound and salutary principles but, will not take away the statutory power of a High Court under s 439 of the Code of Criminal Procedure, to interfere in special cases or in cases where there has been grave miscarriage of justice or where patent illegalities exist on the face of the record. The practice though long and fairly uniform cannot by period for which it has prevailed, acquire the status of a statutory limitation on s 439 of the Code of Criminal Procedure.

—, 1898, ss 242 and 537—Omission on the part of the Magistrate to ask accused why he should not be convicted—Omission curable under s 537

If all the material facts are stated by the Magistrate to an accused, and the accused pleads that he has committed the offence the mere omission to ask him to show cause why he should not be convicted, will, at best amount to an irregularity, and if no prejudice has been occasioned such an irregularity can be cured under s 537 of the Code of Criminal Procedure.

*Aidal Singh v State* (1), *Hansraj v The State* (2) relied on

—, 1898, s 243—Requirements of—Mandatory—Disregard of, vitiates trial—Statements of several accused recorded as joint statement of all of them—Provisions of s 243 held violated.

The requirements of s 243 of the Code are mandatory in character and a violation of these provisions vitiates the trial and renders the conviction legally invalid.

*Kaushalva Das v. State of Madras* (3) followed

The provisions of s 243 say that the admission shall be recorded "as nearly as possible in the words used by" an

\*While sitting at Lucknow

(1) 1957 A W R 553

(2) A.I.R. 1956 All 641.

(3) AIR 1966 SC 22

accused; and this can only be possible if the statement of each individual accused is recorded separately. The recording of their statements as a joint statement of them all is doing violence to the language of the section.

*Ak'l Pasha v. State of Mysore* (1) relied on.

Indian Penal Code, 1860, s 188 and Code of Criminal Procedure 1898, s 144—*Mere disobedience of order passed under s 144 do not amount to an offence under s 188*

Rule of Practice—*Deviation from*

A rule of practice is a rule of guidance and not a rule of law and the High Court can deviate from the rule of practice in order to subserve the ends of justice

Criminal Revision No 160 of 1973 connected with Criminal Revision Nos 164, 165, 166, 167, 168 and 169 of 1973 against the judgment and order dated 22nd May, 1973 passed by PRABHU NATH MISRA, City Magistrate and Magistrate, First Class, Lucknow.

*Mohd Abid Ali and Z Jilani*, for the Applicants

*S N Trivedi*, for the State

K B SRIVASTAVA, J.—This bunch of criminal revisions raises important questions of law and fact and on that account have been taken up together, and this judgment would govern all these cases

Whereas annual examinations had started in the Lucknow University and its affiliated colleges and the invigilators had expressed a fear that the examinees were likely to take to violence; and whereas the Sunni community was holding Milad and the Shia community was taking exception to some of its activities; and whereas the appointment of the Chief Justice of India and the enactment of the Aligarh Muslim University Act had created a law and order situation; and whereas State Government employees were intending to indulge in a propaganda; and whereas, in the opinion of the Additional District Magistrate (City) Lucknow, these furnished sufficient ground for proceeding under

(1) (1967) 2 Cr L J 1422

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s 144 of the Code of Criminal Procedure as immediate prevention or speedy remedy was desirable, he, by a written order dated 9th May, 1973 directed all persons residing within the limits of the Lucknow Nagar Mahapalika, Lucknow Cantonment Board and the Charbagh and Alambagh Notified Areas, to abstain from certain acts as he considered that such directions were likely to prevent, or tended to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or disturbance of the public tranquility, or a riot or an affray. These directions, in so far as they are relevant, were as follows:

No such person shall—

(i) collect or join an assembly of five or more than five persons, without the prior permission of himself or of the City Magistrate or of the Superintendent of Police (City), obtained 24 hours in advance,

(ii) take out or join a procession, without the permission aforesaid,

(iii) . . . . .

(v) raise any slogan of any kind, or spread any rumour, or affix any poster or pamphlet at any place, or distribute any such posters or pamphlets, as were likely to disturb the public tranquillity

In spite of due promulgation and knowledge of the order, groups of persons took out processions on 10th, 11th, 12th, 13th, 14th, 15th and 16th May, 1973 on the road leading from Darul Shafa and going towards the residence of the Chief Minister; and raised various slogans derogatory of Shrimati Indira Gandhi, Prime

Minister, or Shri Noorul Hasan, Minister of Education, Central Government, or Shri Kamalapati Tripathi, the then Chief Minister of Uttar Pradesh. In these slogans, a demand was made for the immediate reopening of the Aligarh Muslim University, the immediate revocation of the Aligarh Muslim University (Amendment) Act, and the immediate restoration of the Aligarh Muslim University Students Union. Some other slogans were also raised which were likely to inflame the feelings of those who heard them, but what actually these slogans were, has not been mentioned either in the first information reports lodged at the police station or in the complaints filed in Court. The Civil Police and the Provincial Armed Constabulary threw a cordon round the processionists and the Magistrates on duty told them that they were committing a breach of the promulgated order and they should, therefore, peacefully disperse but in spite of this warning, these processionists did not disperse and instead broke the cordon and proceeded towards the residence of the Chief Minister. The Civil Police and the P. A. C. forces then arrested the persons who had broken the cordon and committed an offence under s. 188 of the Indian Penal Code. Forty-four such persons were arrested on 10th May (Criminal Revision 169); 24 on 11th May (Criminal Revision 155), 55 on 12th May (Criminal Revision 160), 28 on 13th May (Criminal Revision 165), 44 on 14th May (Criminal Revision 164); 49 on 15th May (Criminal Revision 167) and 77 on 16th May (Criminal Revision 168). Seven separate trials took place against these seven groups of arrested persons. The 44 persons arrested on 10th May (Criminal Revision 169) were sentenced to pay a fine of Rs 50 each, and in default of payment of fine, to undergo one month's simple imprisonment. The members of various other groups arrested, were sentenced to pay a fine of Rs 40 each and in default of

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payment of fine, to undergo simple imprisonment for a period of three weeks each. The 44 persons (Criminal Revision 169) went up in revision before the Sessions Judge but their revision was dismissed, and feeling still aggrieved, they have come up in revision to this Court. The other six groups of convicted persons did not file revisions before the Sessions Judge and have come directly to this Court.

A preliminary objection has been raised by the learned Deputy Government Advocate that the revisionists in Criminal Revisions Nos 160, 164, 165, 166, 167 and 168 did not first apply to the Sessions Judge before coming up in revision to this Court and, therefore, their revisions should be summarily dismissed on that account. Undoubtedly, it has been laid down in various decisions that the High Court will not, ordinarily, entertain such revision applications when the Court of Session has jurisdiction to entertain them, but it can be done in special cases. See *Suraj Mohan v State of Gujarat* (1), *Sahdev Mandal v Hanga Munni* (2) and *Narayanan v Kannamma* (3). The long standing practice of normally rejecting revisions filed directly in High Courts is bounded on sound and salutary principles but, will not take away the statutory power of a High Court under s 439 of the Code of Criminal Procedure, to interfere in special cases or in cases where there has been grave miscarriage of justice or where patent illegalities exist on the face of the record. The practice though long and fairly uniform cannot by the period for which it has prevailed, acquire the status of a statutory limitation on s 439 of the Code of Criminal Procedure. The High Court not only has the power which it has in every case under s 435 of the Code but also on proper grounds, certainly, should interfere even as a matter of practice when the particular facts spe-

(1) AIR 1967 Guj 126

(2) AIR 1967 Pat 223

(3) AIR 1969 Ker. 126 (F.B.)

cially justify such interference. A rule of practice is a rule of guidance and not a rule of law and the High Court can deviate from the rule of practice in order to subserve the ends of justice. The revisionists had seen that the Sessions Judge had dismissed the single revision that had been filed in one case and were not sure of their ground that a similar revision by them in that very Court was likely to succeed. Besides, they had not paid the fines imposed on them and were bound to be taken into custody and would have been compelled to serve out the imprisonment in default by the time they filed a revision before the Sessions Judge and thereafter a revision in this Court for the redress of their grievances. In view of all that I have said regarding this matter, the preliminary objection is overruled.

The first contention of the learned counsel for the revisionists is that the convictions under s 188 of the Indian Penal Code were bad because mere disobedience of s 144 of the Code of Criminal Procedure is not an offence and that it is necessary that the disobedience should be coupled with the most essential ingredient of s 188, I P C namely, that such disobedience caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, and unless this ingredient was established, mere disobedience will not complete the offence. There can be no quarrel with this proposition of law that mere disobedience of an order promulgated by a public servant is not in itself an offence unless it entails one or the other of the consequences which the section itself mentions. The question, however, is whether or not this vital ingredient existed. It is immaterial that the Magistrate who instituted the various complaints, did not specifically mention this ingredient in them, but it is prominent and apparent in the various first information reports

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lodged by the authorities. The trial Magistrate also took care to specify in the question put by him that the offence under s 188 of the Indian Penal Code had been committed, because the revisionists had obstructed the police personnel in the due performance of their duties. No exception, therefore, can be taken to the convictions on this ground.

The second contention of the learned counsel is that the provisions of s 242 of the Code of Criminal Procedure are mandatory in nature and non-compliance with these provisions, will render the trial illegal, requiring the convictions to be quashed. I may here mention that a trial in a case under s 188, I P C is a summons trial, and can be tried summarily also. Under s 262 of the Code of Criminal Procedure, offences that can be tried summarily comprise both summons cases and warrant cases. This section provides that in the summary trial of summons cases, the procedure to be followed is that of summons cases except as otherwise provided in Chap XXII. That being so, the procedure for trial of a case under s 188 is the procedure laid down in Chap XX. S 242 of the Code of Criminal Procedure, states that when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted. The learned counsel has argued that in none of the given cases, the Magistrate stated the particulars of the offence and in none of these cases he asked the revisionists if they had any cause to show why they should not be convicted and, therefore, there was a flagrant disregard of the mandatory provisions of s 242, a disregard which amounted to illegality not curable even under s 537 of the Code of Criminal Procedure. The records show that the trial Magistrate enumerated the



particulars of offence and the only blemish for which he is blameworthy is that he did not ask any accused to show cause why he should not be convicted. The question now is whether this omission rendered the trial illegal or it was a mere irregularity which could be cured under s 537 provided such omission has not, in fact, occasioned a failure of justice. High Courts are not agreed whether such an omission amounts to an illegality or to a mere irregularity curable under s 537 Code of Criminal Procedure. The High Courts of Calcutta in *Empress Dairy Ltd* (1) and Pepsu in *Mastun Singh's case* (2) have taken the view that such an omission is an illegality and not a mere irregularity. Contrary to this, the High Courts of Bombay in *Mulkraj's case* (3), Madras in *Public Prosecutor* (4), Patna in *Rajeshwar Prasad Singh* (5), Assam in *Sunath Chandia* (6), Hyderabad in *Ahmad* (7), Orissa in *Bidyadhar Tunga* (8), and Rajasthan in *State of Rajasthan* (9) have held that such an omission is only an irregularity which under s 537 does not vitiate a trial unless it has occasioned a failure of justice. The views of our own High Court are somewhat conflicting. It was held in *Aidal Singh v State* (10) that s 242 was mandatory and the effect of non-compliance with the mandatory provisions contained in that section was that the conviction could not be maintained. The decision in *Hansraj v The State* (11), however, turned on the question of material prejudice and not on the question of illegality. I think that while the provisions of s 243 are mandatory, the same cannot be said to be true with regard to s 242. If all the material facts are stated by the Magistrate to an accused, and

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(1) A I R 1950 Cal 61

(2) A I R 1953 Pepsu 125

(3) A I R 1965 Bom 80

(4) A I R 1919 Mad 52

(5) A I R 1949 Pat 828

(6) A I R 1961 Assam 19

(7) A I R 1955 Hyd 174

(8) A I R 1959 Orissa 121

(9) A I R 1957 Raj 296

(10) 1957 A W R 558

(11) A I R 1956 All. 641

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the accused pleads that he has committed the offence, the mere omission to ask him to show cause why he should not be convicted, will, at best, amount to an irregularity, and if no prejudice has been occasioned, such an irregularity can be cured under s 537 of the Code of Criminal Procedure. I, therefore, discard this contention also of the learned counsel.

The third contention of the learned counsel for the revisionists is that the provisions of s 243 of the Code of Criminal Procedure are, at any rate, mandatory in nature and if there is disregard or disobedience, the convictions recorded in spite of non-compliance with the peremptory provisions, will be rendered illegal. There can be no doubt that s 243 is mandatory. S 243 states that if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly. It was held by the Supreme Court in *Kaushalya Das v. State of Madras* (1) thus:

“In our opinion, the requirements of s 243 of the Criminal Procedure Code are mandatory in character and a violation of these provisions vitiates the trial and renders the conviction legally invalid. The requirement of the section is not a mere empty formality but is a matter of substance intended to secure proper administration of justice. It is important that the terms of the section are strictly complied with because the right of appeal of the accused depends upon the circumstance whether he pleaded guilty or not and it is for this reason that the Legislature requires that the exact words used by the accused in his plea

(1) A I R. 1966 S C 22.

of guilty should, as nearly as possible, be recorded in his own language in order to prevent any mistake or misapprehension. It has been held by the Madras High Court in *Queen Empress v Enagadu* (1) that the violation of the procedure in s 243 of the Criminal Procedure Code was sufficiently serious to invalidate the conviction of the accused. The same view has been taken by the Calcutta High Court in *Sharlabala Das v Emperor* (2) and by the Allahabad High Court in *Mukandi Lal v State* (3). In our opinion, these cases correctly lay down the law on the point."

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Now, the question is whether the requirements of law, as laid down by s 243, were or were not complied with in the instant cases. The records of these cases show that the trial Magistrate did not record the statement of each accused separately. What he did, in fact, was that he recorded a single question and put that question to the several accused in each case and recorded their statements as a joint statement of all. What mode was actually adopted by him, is not apparent on the record, and has been left to surmise. Either, he put the same question as many times as there were accused in a particular case and heard their separate statements and kept them in his memory, and then reduced those separate statements as a joint statement. If he did this then in that event, what he actually recorded was his conclusion of their statements, or else, he put that question only once to all of them together, and then there was a babel of voices, each giving his own reply to that question simultaneously, and the Magistrate recorded his impression of their statements as a joint statement. We do not really know what happened. There is no doubt, how-

(1) I L R 15 Mad 83  
(2) A I R 1962 All 212

(3) I L R 62 Cal 1127 - A I R  
1935 Cal 489.

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ever, that he paid scant regard to the salutary provisions of s 243, Magistrates should realise that a conviction recorded by them is not final, and may be agitated in appeal or revision, as the case may be, and a superior Court is entitled to come to its own independent conclusion, irrespective of the conclusions arrived at by the Magistrate, as to whether the statement of an accused amounts to admission of certain facts or a confession of his guilt. Magistrate can keep the record straight and even only if as many statements are recorded as there are accused, and the statement of each of them is recorded as nearly as possible in the same words that were used by them. The provisions of s 243 say that the admission shall be recorded "as nearly as possible in the words used by an accused, and this can only be possible if the statement of each individual accused is recorded separately. The recording of their statements as a joint statement of them all is doing violence to the language of the section. This was condemned by the Judicial Commissioner's Court of Manipur in *Thangia Tarabat Singh v State* (1) and by the Mysore High Court in *Akil Pasha v State of Mysore* (2). I am in respectful agreement with these two decisions. It should be obvious that each accused would not have uttered the same words, each must have conveyed his reply in his own words, and used different words and phraseology, amounting either to admission or to confession, and if the correct procedure is not followed, the record will be not helpful to a superior Court. There can be no escape from the conclusion, therefore, that the mandatory provisions of s 243 were not observed in letter and spirit with the result that the convictions have become bad in law. The learned Deputy Government Advocate argued that s 243 is

(1) 1961 (2) Cr L J 583

(2) 1967 (2) Cr L J 1422

controlled by s 263(g) of the Code of Criminal Procedure and, therefore non-compliance of s 243 will become immaterial, in view of the provisions of s 263 (g). S 263 provides for some of the matters in respect of which the ordinary procedure may be departed from in summary trials, in a case in which no appeal lies. It says that in cases where no appeal lies, the Magistrate need not record the evidence of the witnesses or frame a formal charge but he shall enter in such form as the State Government may direct certain particulars, including the particulars mentioned in cl (g), namely the plea of the accused and his examination, if any. The argument is that since the trials were 'summary', the trial Magistrate had to follow the procedure laid down in s 263(g), namely that he had to record the plea and the examination and there was no duty cast upon him to record the statement as nearly as possible in the words used by each accused. I do not think there is any substance in this contention. It has been seen above that in the trial of a summons case in the summary manner the procedure to be followed is that prescribed for the trial of a summons case, and the procedure for that is mentioned in s 243. S 243 being the special section must, in normal construction of a statute, exclude the general. While dealing with s, 243 and the general provision contained in s 362 (2-A), the Supreme Court observed in *Kaushalya Das's* case (1) that s 243 is a provision of a special character and according to well established rule of interpretation that special provision will take precedence and override the general provision of s 362(2-A) of the Code of Criminal Procedure. The same view was taken in *Mukand Lal v State* (2) and in *Gopal Singh v State* (3). The objection raised by the learned Deputy Government Advocate is therefore, of no avail.

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(1) AIR 1966 SC 22 (2) AIR, 1962 All 212  
 (3) AIR 1960 JK 64

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The learned Deputy Government Advocate then contended that if the revisions are allowed and the convictions quashed, the cases should be sent back to the trial Magistrate for a *de novo* trial but this move was vehemently opposed by the learned counsel for the revisionists and, if I may say so, for very substantial reasons. The offences were very petty and the sentence awarded were equally petty. The situation likely to disturb the public tranquillity and disturb public order is long past. The revisionists have already suffered physically by being arrested and sent to jail to undergo the imprisonment in default, even though they were released only after few days. The interests of justice are not going to be furthered by subjecting them to the further ordeal of a fresh trial and by compelling them to meet a second round of expenditure in defending themselves. I do not think, therefore, that the cases are one which require a re-trial.

Before parting with the case, I would like to deal with the last contention also of the learned counsel for the revisionists that the sentence of imprisonment awarded in default of payment of fine is unwarranted by law. Even though the decision on that point does not appear to be very necessary in view of the fact that the convictions are being quashed and no fresh trials are being ordered, I wish to deal with this last point because the trial Magistrate and the learned Sessions Judge have a misconception of the correct position in law. An offence under Part One of s 188 of the Indian Penal Code is punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to Rs 200 or with both. The question is as to what could be the maximum extent of imprisonment in default of payment of fine. The trial Magistrate has awarded one month's simple imprisonment in default in one case and three weeks'

imprisonment in the other cases. As sentence of imprisonment in default of payment of fine can be awarded under s 64 of the Indian Penal Code, this section is comprehensive in nature and contemplates two categories of cases, namely, (a) offences punishable with fine only, (b) offences punishable either with imprisonment, or with fine or with both S 65 of the Indian Penal Code deals with cases where fine and imprisonment can be awarded and also those where the punishment is either fine or imprisonment but not both. The only cases where it does not apply are those dealt with under s 67 where fine only can be awarded. S 67 is not applicable to the instant cases because that deals with fine only whereas imprisonment or fine or both can be awarded for an offence under s 188 of the Indian Penal Code. S 65 deals with such a case and it says that the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. S 33 of the Code of Criminal Procedure also deals with imposition of imprisonment in default of payment of fine. Under s. 33 (i), a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law in case of such default. There are, however, two exceptions to this general power. The first limitation of the power is mentioned under cl. (a) of the proviso which says that the term should not be in excess of the Magistrate's powers under the Code. So, although s 65 of the Indian Penal Code authorizes the awarding of imprisonment in default of payment of fine, to the extent of one-fourth of the maximum term prescribed for the offence, the Magistrate under cl (a) of sub-s. (1) of s 33 of the Code of Criminal Procedure, will not be

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competent to award even this term if it is in excess of his ordinary powers. The second limitation is provided in cl (b) of sub-s (1) of s 33 which says that in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence. Thus, a Magistrate who is competent to award two years' imprisonment as a substantive sentence can award imprisonment in default up to six months, but if the offence itself is punishable on the outside limit with six months' imprisonment, he cannot award more than one and a half months as imprisonment in default of payment of fine. The trial Magistrate and the learned Sessions Judge felt that the maximum substantive term of imprisonment awardable under s 188, I P C, Part One, being one month imprisonment in default of payment of fine may also extend to one month because under s 33(1)(a) that term is not in excess of the Magistrate's powers under the Code of Criminal Procedure. The learned Sessions Judge was misled by the decision in *Beg v Muhammad Saib* (1) which was specifically overruled by another Full Bench of the same Court in a decision reported in Weir's Criminal Digest, p 335 and by a subsequent Full Bench decision of that Court in *Queen Empress v Venkatanagadu* (2). Our own High Court took the same view in the *Empress of India v Darha* (3). Finally, the Supreme Court has confirmed the view of this High Court and of the two later Full Bench decision of the Madras High Court in *Chajju Lal v State of Rajasthan* (4). The learned Sessions Judge lost sight of the words "as is authorized by law" occurring in sub-s (1) of s 33

(1) 11 R 1 Mad 277 (F B)

(3) 1 L R 1 All 461 (F B)

(2) 1 L R 10 Mad 165 (F B)

(4) A I R 1972 SC 1809



The import of these words is very wide and the meaning is clear that imprisonment in default must be in conformity not only with one or more sections of the Code of Criminal Procedure but also with the relevant sections of the Indian Penal Code. A sentence of imprisonment in default of payment of fine cannot exceed one-fourth of the maximum substantive term of imprisonment provided for that offence, and sentence of substantive term of imprisonment under Part one of s 188 of the Indian Penal Code is one month and, therefore, imprisonment in default of payment of fine could not exceed one week. However, this question is purely academic now in view of what I have said earlier.

Altogether, therefore, these revisions are allowed and the convictions of the petitioners in the seven cases are quashed. The fines, if already paid, shall be refunded to them forthwith.

*Revisions allowed*

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## CIVIL MISCELLANEOUS

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*Before Mr Justice K. N. Seth*

SITAL DAS

.. PETITIONER,

*v.*

STATE OF U. P. AND OTHERS

.. RESPONDENTS.

1973

August, 8.

**U. P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972, s 43(2)(rr) and Constitution of India, Art 14—Permission under s 3 of U. P. Act no. 3 of 1947 to file a suit for eviction of tenant—Application under s 21 of New Act 13 of 1972—Ejectment without payment of compensation—Provisions not discriminatory.**

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In enacting s 43(2)(ii) the intention of Legislature appears to be that where permission has been obtained under s 3 of the old Act on any ground specified in sub-s (1) or sub-s. (2) of s 21 and has become final and a suit for eviction of tenant has not been instituted, the landlord should be allowed to avail of the simple procedure prescribed under the new Act for eviction of the tenant unlettered by any condition and without being called upon to pay any compensation to the tenant. Persons falling under s 43(2)(ii) who have obtained permission for eviction under the old Act, could legitimately be classified as separate group distinct from those who obtained an order for eviction of the tenant under s 21 of the 1972 Act. No distinction has been made in the impugned provision between persons falling in the same class.

Writ No 7859 of 1972.

*R N Bhalla*, for the Appellant

S C., for the Respondents

K. N SETH, J .—The petitioner is a tenant of two shops in premises no 4/143, New Hardeoganj, Belanganj, Agra. They were allotted to him under s 7(2) of the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter called the Act). The landlord moved an application under s. 3 of the Act seeking permission to file a suit for ejectment against the petitioner on the ground of personal need. The Rent Control and Eviction Officer by his order dated 25th January, 1971, granted necessary permission after considering the comparative needs of the tenant and the landlord. The petitioner was afforded an opportunity to avail of the offer made by the landlord and surrender one of the two shops in his occupation within fifteen days of the making of the order. The petitioner filed a revision before the Commissioner, Agra Division, Agra, under s 3(2) of the Act. The Commissioner dismissed the revision but allowed one month's time to the petitioner from the date of his order to avail of the offer made to him by the landlord and surrender one of the shops in favour of the land-

lord. The petitioner filed a petition under s. 7-F of the Act before the State Government and reiterated the various pleas raised by him before the Rent Control and Eviction Officer and the Commissioner. The State Government, by its order dated 25th October, 1972, rejected the petition. The landlord thereafter moved an application under s. 21(1) of the U. P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972, for the ejection of the petitioner from the accommodation in dispute. The Prescribed Authority issued a notice to the petitioner dated 13th November, 1972 to show cause why he should not be evicted. Thereupon the petitioner filed the abovenoted petition for quashing the orders of the Rent Control and Eviction Officer, the Commissioner and the State Government dated 25th January, 1971, 9th August, 1971 and 25th October, 1972, respectively.

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Learned counsel for the petitioner contended that the authorities concerned failed to apply their minds in considering the comparative need of the petitioner and that of the landlord and that the order of the State Government did not contain any reasons for rejecting the petition under s. 7-F of the Act. I have carefully looked into the orders passed by the various authorities referred to earlier and I find no substance in the grievance made by the petitioner. All the authorities appear to have carefully weighed the comparative needs of the tenant and the landlord and on being satisfied that the need of the landlord was *bona fide* and more pressing, permission was accorded for filing a suit for the eviction of the petitioner. The contention of the petitioner that the order of the State Government does not disclose any reason and independent application of mind for the rejection of the petition under s. 7-F of the Act is without any substance. It has referred to the various

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pleas raised by the parties and then arrived at the conclusion that no interference against the order of the subordinate authorities was called for. As the State Government affirmed the orders passed by the subordinate authorities, it was not necessary to discuss the entire evidence in detail. The order does indicate that the State Government applied its mind to the comparative needs of the parties.

It was next contended that the permission should not have been granted for the ejectment of the petitioner from both the shops as the offer made by the landlord indicated that his need would be satisfied by one of the shops in dispute. This argument too has no merits. It was only by way of concession and to avoid prolonged litigation that the offer was made by the landlord. The petitioner did not accept that offer. However, the Rent Control and Eviction Officer and the Commissioner offered him fresh opportunities to avail of the offer made by the landlord but the petitioner instead of accepting the offer went up to the State Government and challenged the correctness of the orders made by the subordinate authorities. The landlord put forward a claim for the need of both the shops for starting a printing press for his disabled son but voluntarily made an offer to be satisfied with only one of the shop if it was surrendered by the petitioner without contest. That does not mean that the need of the landlord for both the shops was not *bona fide*.

In this connection a further argument was advanced that the State Government did not afford another opportunity to the petitioner to accept the offer made by the landlord and vacate one of the two shops in his possession. It was urged that the petitioner was agreeable now to surrender one of the shops to the landlord. The petitioner failed to take advantage of the offer made by

the landlord and the two opportunities afforded by the subordinate authorities. He cannot be heard to complain that the State Government did not again offer him that option or that this Court should now permit him to take advantage of the offer made by the landlord after having failed in his contest right up to the State Government

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It was lastly contended that the provisions contained in s 43(2)(rr) of U P Act no 13 of 1972 are null and void being discriminatory and are hit by Art 14 of the Constitution of India and the proceedings being taken thereunder are without jurisdiction. It was urged that under the aforesaid Act if an application is made under subs (a) of s 21(1) for eviction of a tenant in respect of any building in which the tenant is engaged in any profession, trade or calling, the Prescribed Authority while making the order of eviction shall award against the landlord to the tenant an amount equal to two years' rent as compensation and may, subject to rules, impose such other conditions as he thinks fit. On the other hand where any permission has been obtained under s 3 of Act of 1947 and has become final and a suit for the eviction of the tenant has not been instituted the Prescribed Authority is empowered under s 43(2)(rr) of the new Act to order eviction of the tenant from the building under his tenancy and the tenant can be evicted without payment of any compensation to him. In this manner a tenant against whom permission has been obtained under the Act of 1947 can be evicted under the provisions of the new Act without payment of any compensation but a tenant against whom such an order is obtained and proceedings for his eviction are taken under the provisions of the new Act, he is entitled to compensation equal to two years' rent and this results in discrimination which makes s 43(2)(rr) of the new Act violative of Art 14 of the Constitution

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The true meaning and scope of Art 14 of the Constitution has been explained in several decisions of the Supreme Court and summarised in the case of *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* (1) Art 14 forbids class legislation but does not forbid classification. The principle of equality does not absolutely prevent the State from making differences between persons and things. The State has the power of classification on the basis of rational distinction relevant to the particular subject dealt with. It must, however, be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question. So long as the classification is based on rational basis and so long as the persons falling in the same class are treated alike, there can be no question of violating the equality clause. If there is an equality and uniformity within each group the law will not be condemned as discriminatory. In enacting s 43(2) (rr) the intention of the Legislature appears to be that where permission has been obtained under s 3 of the old Act on any ground specified in sub-s (1) or sub-s (2) of s 21, and has become final and a suit for the eviction of the tenant has not been instituted, the landlord should be allowed to avail of the simple procedure prescribed under the new Act for the eviction of the tenant unfettered by any condition and without being called upon to pay any compensation to the tenant. Persons falling under s 43(2)(rr) who have obtained permission for eviction of the tenant after protracted litigation under the old Act, could legitimately be classified as a separate group distinct from those who obtain an order for the eviction of the tenant under s 21 of the

1972 Act. No distinction has been made in the impugned provision between persons falling in the same class.

The provision for payment of compensation to a tenant who is sought to be evicted from a building in which he is engaged in any profession, trade, or calling is a new feature introduced by the 1972 Act. It was within the competence of the Legislature to lay down conditions and specify circumstances under which a landlord may obtain an order for the eviction of the tenant. It is not correct to assert that by not applying such a provision to cases where permission for the eviction of the tenant had been obtained under the old Act but he was sought to be evicted under the procedure prescribed under the new Act, the provision contained in s 43(2)(rr) is rendered discriminatory. A date has to be specified from which such a provision would become effective and if that date is selected as the date of enforcement of the Act or the date of an order it could not be characterised as arbitrary or fanciful. As observed by SHAH, J in *Messrs. Hathising Manufacturing Co Ltd. v Union of India* (1) "the State is undoubtedly prohibited from denying to any person equally before the law or the equal protection of the laws, but by enacting a law which applies generally to all persons who come within its ambit as from the date on which it becomes operative, no discrimination is practised." The same principle was reiterated in *Messrs. Jain Brothers v. The Union of India* (2). In that case the validity of s 297(2)(g) of the Income Tax Act, 1961, was challenged on the ground that the provision created a discrimination between two sets of assesseees with reference to the completion of assessment proceedings on or after 1st April, 1962.

(1) A I R. 1960 S.C. 923.

(2) A I R. 1970 S.C. 778.

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For imposition of penalty assesseees were classified in two groups—those whose assessment had been completed before 1st April, 1962, the proceedings and imposition of penalty would be governed by the Act of 1922 whereas in case of assesseees whose assessment was completed after the specified date, the Act of 1961 was to govern the proceedings for imposition of penalty. It was contended that Art 14 was attracted because the classification made was purely arbitrary depending on the accident of the completion of assessment. This argument was negatived and it was held that the classification was based on intelligible differentia having reasonable relation to the object intended to be achieved. On the same principle it must be held that if a landlord who has obtained permission under the old Act and that permission has become final, he could form a distinct class and the provisions contained in s 43(2)(rr) of the new Act could not be condemned as discriminatory. In the result the petition fails and is dismissed with costs.

*Petition dismissed*

## CIVIL REVISION

*Before Mr. Justice G. C. Mathur*

SURENDRA KUMAR ASTHANA ... APPLICANT,

*v.*

SMT. KAMLESH ASTHANA . . . RESPONDENT.

1973  
 August, 81.

**Hindu Marriage Act, 1955, s. 24—Question of jurisdiction raised—Expenses to the needy spouse—Can be allowed—Courts discretion.**



Even where a question of jurisdiction has been raised the court has, before deciding that question, power to grant relief under s 24 of the Hindu Marriage Act provided that, on the averments made in the petition, the petition is maintainable and the court, *prima facie*, has jurisdiction to entertain it. Though the court has this power, it has discretion under s. 24 to postpone the consideration of relief under s 24 till the question of jurisdiction is decided. It would, however, be desirable to allow expenses to the needy spouse to fight out the issue of jurisdiction also, even whether the court thinks that the question of *pendente lite* maintenance should be decided after the issue of jurisdiction has been decided.

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—, 1955, s 24 and Code of Civil Procedure, 1908, s. 115—  
*Revision arising out of proceedings under the former Act—  
It is a proceeding under the Hindu Marriage Act—Court's  
jurisdiction to allow expenses of revision.*

Relief under s 24 of the Hindu Marriage Act can be granted in a revision against an order passed in a proceeding under the Act. The words "in any proceeding under this Act" have been used in a wider sense to include all proceedings arising out of orders passed in petition filed under the Hindu Marriage Act. Relief can be granted on an application under s. 24 even in a revision filed under s 115, C P C.

Civil Revision No 812 of 1972 from the judgment and order dated the 8th of July, 1972, passed by J. K. Mathur, Civil Judge, Agra, in Suit No 42 of 1972

*K C. Agarwal* and *K C Saxena*, for the Applicant

*P K Darbari*, for the Respondent

G C. MATHUR, J.—On 25th January, 1972, Smt. Kamlesh Asthana (hereinafter referred to as the 'wife') filed, in the court of Civil Judge, Agra a petition under s 9 of the Hindu Marriage Act, 1955, for restitution of conjugal rights against her husband Sri Surendra Kumar Asthana, the applicant in this revision. At that time and even now the husband is working and residing in Tehran (Iran). After notices were served on the husband, he on 24th March 1972, put in appearance under protest. On 25th March, 1972, he filed an application stating that he was a foreign national and was not domiciled in any territory to which the Act extended and

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that he was not subject to the jurisdiction of Indian courts. He asked for time for filing writing statement and prayed that in the mean time the question of jurisdiction be determined. Immediately thereafter on 28th March, 1972, the wife filed an application under s 24 of the Act praying that a *pendente lite* monthly alimony or monthly maintenance of Rs 2,000 per month and a sum of Rs 1,256 towards the expenses of the petition may be awarded to her. The application came up for hearing before the Civil Judge on 6th July, 1972. On that day the wife insisted that the application under s 24 of the Act be decided before the question of jurisdiction was considered. The husband on the other hand pressed that the question of jurisdiction be decided first. The court heard arguments on this question and fixed 8th July, 1972 for orders. On 8th July, 1972, he passed an order that the application under s 24 will be decided before the question of jurisdiction can be taken up. Against this order the husband filed this revision in this Court on 28th July, 1972. The revision was admitted and the proceedings before the Civil Judge were stayed.

During the pendency of the revision the wife filed, on 9th October, 1972, an application under s 151, C P C, read with s 24 of the Hindu Marriage Act to grant *pendente lite* alimony of Rs 2,000 per month from 30th January, 1972. She also prayed for the grant, provisionally, of at least Rs 2,100 as costs of the proceedings. It was further stated in the application that the revision and the stay application be not heard until the husband complied with the orders of this application. Counter-affidavit and rejoinder-affidavit have been filed in this application. By an application filed on March 36, the husband sought to file certain documents to establish that he was a foreign national

and not domicile in India. In the revision application, which came up for hearing before me, Sri B. S. Darbari, learned Counsel for the wife contended that the application under s 151, C P C. read with s 24 of the Act should be disposed of first and the interim *pendente lite* maintenance as well as expenses of this revision be awarded to the wife and that the revision should not be heard on merits till the *pendente lite* maintenance and expenses were paid by the husband. I have heard Counsel for the parties at length on this application and on the revision.

There is no doubt that an application under s 24 of the Hindu Marriage Act is an application for an interim relief during the pendency of the proceedings. Such an application has to be decided before the proceedings are finally disposed of. If such an application is allowed and an order for payment of *pendente lite* maintenance and/or expenses is passed, there is power in the court to stay further proceedings till the order is complied with. But the Court has also a discretion, even after passing an order under s 24 of the Act, to continue with the proceedings and to leave the recovery of the amount awarded to other process of law. In the present case I do not think it fit to postpone the hearing of the revision till after an order under s. 24 is passed and is complied with, as that would not be in the interest of the wife and would further delay the proceedings.

S 24 of the Hindu Marriage Act provides:

"Where in any proceeding under this Act it appears to the court that either the wife of the husband as the case may be has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on

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the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable "

It may be noticed that under this section both the husband and the wife can seek relief. The *pendente lite* relief is be given to a spouse, who is not in a financial position to maintain himself or herself and to bear the expenses of the litigation, and the relief has to be granted against the spouse who is in a better financial position. The relief can only be granted in a proceeding under the Hindu Marriage Act.

Two objections have been raised by Sri K. C. Saxena, learned Counsel for the husband, to the grant of relief under s. 24, namely:

1 That the Hindu Marriage Act is itself not applicable, as the husband is a foreign national and is not domiciled in any area to which the Act applies.

2 That this revision is not a proceeding under the Act, but is merely a proceeding under s. 115, C P C arising out of an order passed not under any provision of the Act but under the Code of Civil Procedure.

The first objection has also been raised in the main petition before the Civil Judge and the dispute in the revision is whether this question should be decided before disposing of the application made before the Civil Judge under s. 24 of the Act. The objection

is based on subs. (2) of s. 1 regarding the extent of the Act. Sub-s (2) reads thus:

“(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.”

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The argument is that since the husband is not domiciled in the territories to which the Act extends and since he is not living in any part of India, the Act does not extend to him and, therefore, neither a petition under s 9 nor an application under s. 24 of the Act lies against him in the Indian courts. It is neither necessary nor desirable to decide this question at this stage. Relief under s. 24 can, in my opinion, be granted even where a question to the jurisdiction of the court has been raised. In matrimonial cases the ordinary rules of procedure are not applicable.

The grant of relief under s 24 is not dependent either on the merits of the petition or on the decision of any particular issue or issues in the case or upon the ultimate success or failure of the petition. The reason behind the rule in s. 24 for payment of *pendente lite* maintenance is that, where marriage is admitted, it is the duty of the affluent spouse to maintain the indigent spouse. This duty is unaffected by the pleas raised in the petition even if the plea be to the jurisdiction of the court. If on the face of the petition it is maintainable and the court has jurisdiction to entertain it, then the court has also the power to grant relief under s 24, even if an objection to the jurisdiction is raised and even before such an objection is decided. Such an objection will be an issue in the case. Likewise, the reason for the provision for

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payment of expenses is that a wife or a husband, who has no independent income sufficient to meet the necessary expenses of the proceeding, may not be handicapped. Such a spouse should not be left without means of putting her or his case fairly before the court. It can be no defence to the claim for expenses that a question of jurisdiction has been raised. Expenses can be awarded even before the question of jurisdiction is decided

In England the rules make provision for the giving of security by the husband for the costs of the wife and for the award of alimony *pendente lite* to the wife. Our s. 24 is more liberal, in that it provides for the payment of expenses to fight the litigation and not merely for security for costs. It further permits relief to the needy spouse, whether it be the wife or the husband. In England courts have granted relief even if questions of jurisdiction, similar to one raised in this case, have been raised pending the decision of those question. In *Smith v. Smith* (1), HILL, J. held that a husband cannot refuse to pay and give security for his wife's costs of divorce suit or issue as to domicile merely on the ground that he disputes the jurisdiction. A husband who appeared under protest to a wife's petition and disputes the jurisdiction on the ground of his having foreign domicile may be ordered to pay his wife's costs of suit up to the setting down of the issue and to give security for her costs attendant on the issue. The decision of the HILL, J. was approved by the Court of Appeal in *Johnstone v. Johnstone* (2). In *Ronalds v. Ronalds* (3) it was held that the fact that there is a plea to the jurisdiction of the court in matrimonial suit does not affect the power of the court to allot alimony *pendente lite*.

(1) L.R. (1928) P. 128

(3) L.R. (1876) 3 P. and D. 289.

(2) L.R. (1929) P. 165.

Therefore, even where a question of jurisdiction has been raised, the court has, before deciding that question, power to grant relief under s. 24 of the Hindu Marriage Act provided that, on the averments made in the petition, the petition is maintainable and the court, *prima facie*, has jurisdiction to entertain it. Though the court has this power, it has a discretion under s. 24 to postpone the consideration of relief under s. 24 till the question of jurisdiction is decided. It would, however, be desirable to allow expenses to the needy spouse to fight out the issue of jurisdiction also, even where the court thinks that the question of *pendente lite* maintenance should be decided after the issue of jurisdiction has been decided. The first objection raised by Sri K. C. Saxena does not stand in the way of granting relief to the wife in this case under s. 24.

The second objection is based on the use of the words "in any proceeding under this Act" and it is contended that a revision application under s. 115, C. P. C., is not proceeding under the Act. It is to be noticed that the Act does not directly provide for an appeal or a revision from orders passed in proceedings under it. S. 21 of the Act provides that subject to the other provisions contained in the Act and of the rules made by the High Court all proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908. S. 28 provides that all decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force. Appeals from decrees and

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orders made under the Act lie under the Code of Civil Procedure, Likewise, revisions also lie against orders made in proceedings under the Act under the Code of Civil Procedure. It is not disputed and there is good authority for the same that relief under s 24 can be granted in an appeal from a decree or order passed under the Act. I can see no reason why then relief under s 24 cannot be granted in a revision against an order passed in a proceeding under the Act. The words 'in any proceeding under this Act' have been used in a wider sense to include all proceedings arising out of orders passed in petition filed under the Act. To hold otherwise would defeat the very purpose of s. 24. In my opinion, it is competent for this Court to grant relief on an application under s 24 even in a revision filed under s 115, C P C, against an order passed in proceedings under the Act. The second objection raised by Sri K C Saxena is also without force.

The application filed by the wife under s. 24 in this revision may now be considered. The first relief prayed for in this application is for the award of alimony or maintenance *pendente lite* of Rs.2,000 per month. This relief is co-extensive with the relief prayed for by the wife in the application under s 24 made before the Civil Judge. It is desirable that the award of this relief be considered by the Civil Judge and not by this Court. The second prayer in the application under s 24 in this Court is that expenses of the hearing of the revision be awarded to the wife. To this relief the wife is clearly entitled. It is to be kept in mind that the award is of expenses and not of costs of the revision. The expenses to be awarded are not to be determined in accordance with the schedule of fees and costs in the High Court Rules or according to the valuation of the



case The Court has to determine what are the reasonable expenses which the wife is likely to incur or has incurred in the litigation In the present case the Counsel for the wife has come from Agra and the case has been heard on three dates In these circumstances, I think the wife should be awarded Rs 500 towards her expenses of this revision

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Coming now to the revision itself, I am of the opinion that the wife is entitled to have her application under s 24 for award of expenses to be considered before the issue of jurisdiction is decided She is entitled to have her expenses for the hearing on the question of jurisdiction This is a fairly complicated issue and is likely to take sometime for hearing In the circumstances, I think the husband should pay Rs 500 to the wife towards the expenses for the hearing of the issue on the question of jurisdiction

Though normally the relief for the grant of maintenance *pendente lite* should also be heard before the question of jurisdiction is decided but the circumstances of the present case indicate that that would not be in the interest of the wife In the present case the husband is living outside India and outside the jurisdiction of the Indian courts and there is likely to be difficulty in enforcing orders passed against him The husband has raised a serious question about the maintainability of the petition and about the jurisdiction of the court Already more than a year and a half has elapsed since the filing of the petition under s 9 of the Act If an order for maintenance *pendente lite* is passed and the proceedings are stayed till compliance is made, it will delay the proceeding further which will in no way help the wife It is in the interest of the wife that the proceedings should be concluded as early

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as possible. In these circumstances, I feel that it would be desirable that the question of payment of maintenance *pendente lite* should be considered by the Civil Judge after deciding the question of jurisdiction.

The revision is partly allowed and the order passed by the Civil Judge is modified. The application filed by the wife under s. 24 for expenses is allowed to this extent that the husband shall pay a sum of Rs 500 towards the expenses of the wife for the hearing of the issue relating to the jurisdiction. The application filed by the wife under s. 24 for the award of maintenance *pendente lite* shall be considered after the issue of jurisdiction has been decided. The husband shall deposit the sum of Rs 500 awarded as expenses for the hearing of the revision in this Court and the sum of Rs 500 awarded for the hearing of the issue relating to the jurisdiction in the court of the Civil Judge within one month from today. The Civil Judge will expeditiously decide the issue relating to the question of jurisdiction and then consider the application under s. 24 for the payment of maintenance *pendente lite*. There will be no order as to costs of this revision.

*Revision partly allowed*

## APPELLATE CIVIL (F. B.)

*Before Mr Justice S Chandra, Mr Justice R B Misra, Mr Justice H. Swarup, Mr Justice K N Seth and Mr Justice A Banerji*

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HUKUM SINGH AND OTHERS . RESPONDENTS

**U. P. Tenancy (Amendment) Act, 1947, s 27(3) proviso—**  
*Person declared to be sub-tenant—Holds the land from year to year*

*(Per majority—HARI SWARUP, J contra)* A person declared to be sub-tenant under the proviso to sub-s (3) of s 27 of the U P Tenancy (Amendment) Act, 1947, holds the land from year to year

*Unchan Singh v Board of Revenue (1) and Aziz Alam v D D C (2) overruled*

U P Zamindari Abolition and Land Reforms Rules, 1952, App III, sl 25(11)—*Amendments to sl no 25(u) by notification dated 20th November, 1954—Effect—Vested rights—Not defeated.*

The amendments introduced to sl no 25(11) of the third Appendix to the Zamindari Abolition Rules by the notification dated 20th November, 1954, are not retrospective in operation so as to defeat vested rights.

Special Appeal No 719 of 1968 connected with Special Appeal No 720 of 1968 from the judgment and order of G C MATHUR, J in Civil Miscellaneous Writ No 410 of 1967, dated 9th July, 1968

S S Varma and R S Verma, for the Appellants

S P Srivastava, Swami Dayal and R S Misra and S. C., for the Respondents

S CHANDRA, J —Hukam Singh, respondent no. 1, was the occupancy tenant of the holding in dispute

(1) 1962 A L J 229 (F B)

(2) 1972 R D 266

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On 20th May, 1944, the Zamindar obtained a decree for his ejectment under s 171 of the U P Tenancy Act, 1939. The decree was executed and possession taken by the Zamindar. Thereafter, he let out the land to the predecessor of the present appellants. On coming into force of the U P Tenancy (Amendment) Act, 10 of 1940 Hukam Singh made an application for reinstatement to the holding. This application was allowed on 10th January, 1949. Under the proviso to s 27(3) of the Amending Act, the present appellants were declared sub-tenants not liable to ejectment for three years. The three years immunity expired on 10th January, 1952.

In 1955 Hukam Singh filed a suit for a declaration under s 229-C of the U P Zamindari Abolition and Land Reforms Act that he was the *sirdar* in possession of the land in dispute and that the present appellants had no right in it. He also filed a similar declaratory suit in the civil court. The revenue court suit was dismissed for non-prosecution. During the pendency of the civil suit Chap IX-A of the Zamindari Abolition Act came into operation. On 9th July, 1956, Hukam Singh made an application under s 240-G of this Act praying for the removal of the names of the present appellants as *sirdars* from the revenue papers. It appears that subsequently in 1957 Hukam Singh instituted yet another declaratory suit against the present appellants. In that suit it was proved in the alternative that if the defendants are held to be in possession, a decree for their ejectment under s 202 of the Zamindari Abolition Act may also be granted. While these proceedings were pending, the land in dispute came under consolidation operations.

Hukam Singh filed objections under s 9 of the U. P Consolidation of Holdings Act claiming to be the *sirdar*.

of the plots. He claimed that soon after the expiry of the three year period on 10th January, 1952, he obtained possession and was since then in cultivatory possession of the plots. He being an occupancy tenant, became a *sirdar* under s 19 of the Zamindari Abolition Act.

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The appellants contested the objection. Their case was that they had themselves continued to be in cultivatory possession throughout. As sub-tenants they became *asamis* under s 21(1)(c) of the Zamindari Abolition Act. The cause of action for their ejection accrued on 10th January, 1952. At that time the prescribed period of limitation was one year. On the expiry of that prescribed period of limitation, they became *sirdars* under s 204 of the Act.

The consolidation authorities concurrently found that the erstwhile sub-tenants had continued to remain in possession of the plots. Hukam Singh never regained possession. After the expiry of the prescribed period of limitation of one year, the title of Hukam Singh extinguished and the present appellants became *sirdars* under s 204.

Feeling aggrieved, Hukam Singh filed a writ petition in this Court. A learned single Judge, relying upon the decision of another single Judge in *Khubi Singh v Joint Director of Consolidation* (1), held that the amendment to entry 25 in App. III of the Zamindari Abolition and Land Reforms Rules, whereby the period of limitation of one year was substituted by 'none', was retrospective. After the amendment there was no period of limitation for such a suit and so the erstwhile sub-tenants did not become *sirdars*. The contrary view of the Deputy Director of Consolidation was manifestly erroneous in law. On this view the

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with petition was allowed and the matter was sent back to the Deputy Director of Consolidation for disposal of the revision afresh. The erstwhile sub-tenants came up in special appeal.

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At the hearing of the appeal it was urged that the sub-tenants held land for a fixed term on the expiry of which cause of action for their ejectment accrued, with the result that a suit for their ejectment ought to have been filed within one year of the date of vesting. In support reliance was placed on *Unchan Singh v. Board of Revenue* (1) and *Purani v. Deputy Director of Consolidation* (2). It was also urged on behalf of the appellants that the amendment to entry 25 of App III of the rules was not retrospective so as to take away rights of a *sirdar* which had already accrued and vested in an erstwhile *asami*. The Bench observed that the vital question for consideration was on what day would the cause of action arise under s 202(b) for filing a suit for ejectment of an *asami* mentioned in cl. (b) of s 21(1). It observed that the decision in *Unchan Singh's* case (1) proceeds on the assumption that the declaration of sub-tenancy under the proviso to s. 27(3) created a sub-lease for a fixed period of three years. It felt that this decision requires reconsideration. The Bench observed that a Full Bench in *Aziz Alam v. Deputy Director of consolidation* (3) had observed that in *Unchan Singh's* case (1) the *asami* held land for a fixed period of three years under s 27 of the U P. Tenancy (Amendment) Act, 1947. Since this observation may imply an approval of the assumption in *Unchan Singh's* case (1) the Bench felt that it is desirable that the matter may be heard by a still larger Full

(1) 1962 A L J 229

(2) 1970 R D 249.

(3) 1972 R.D. 206 (F B.)

Bench It referred the following questions of law for decision to a larger Full Bench.

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“(1) Whether persons declared to be sub-tenants under the proviso to sub-s (3) of s. 27 of the U P. Tenancy (Amendment) Act, 1947, hold that land from year to year or for a fixed period within meaning of s. 202(b) of the Zamindari Abolition Act?

(2) Whether the amendments introduced to sl. no 25(2) of the third appendix of the Zamindari Abolition Rules by the notification dated 20th November, 1954, were retrospective in operation?”

In regard to the first question the position is that sub-s. (1) of s 27 of the U. P Tenancy (Amendment) Act, No X of 1947 entitled certain classes of ejected tenants mentioned under cls (a), (b) and (c) thereof to apply for reinstatement to the holding Such an application could be made within six months from the date of the commencement of that Act, namely, 14th June, 1947, Sub-s (3) of s 27 provided.

“(3) On receipt of an application under sub-s. (1) or sub-s (2) the court shall give notice to the landholder and to the tenant, if any, in possession of the whole or part of such holding After making such enquiry as may be necessary, if the court is satisfied that the applicant was so ejected or dispossessed, it shall order that the applicant be reinstated in such holding or part thereof, as the case may be, and that any other person in possession of it be ejected therefrom;

Provided that if such holding or any part thereof is in the possession of any person to whom the

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landholder had let it out before the first day of September, 1946, such person not being a relation, dependant or servant of the landholder, the court instead of ordering the ejectment of such person shall, notwithstanding the provisions of any law for the time being in force, declare him to be the sub-tenant of the applicant in respect of such holding or such part. The person so declared as a sub-tenant shall not be liable to ejectment until after the expiry of three years from the date of the declaration. In such a case, the rent payable by the applicant to the landholder shall be the rent payable by him for such land before his ejectment or the amount calculated according to the circle rates whichever is less, and the rent payable to the applicant by the person declared as sub-tenant shall be the amount payable by such person to the landholder immediately before the declaration or twelve and a half per cent, over and above the amount calculated according to the circle rates applicable to hereditary tenants, whichever is higher."

Sub-s (5) is also material. It reads:

"(5). On reinstatement, the rights and liabilities of the applicant existing on the date of his ejectment or dispossession in respect of the holding or any part thereof from which he was ejected or dispossessed, shall revive subject to the proviso to sub-s (2) "

For the appellant it was submitted that the declaration of sub-tenancy under the proviso to sub-s. (3) makes the subsequently inducted tenant a statutory sub-tenant. His only right is to remain in possession for three years and thereafter he ceases to be the sub-



tenant. Hence the creation of sub-tenancy is for a fixed term of three years from the date of declaration. On expiry of this term he having ceased to be a sub-tenant, his continued possession will be as a trespasser. There are several difficulties in accepting this submission

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The proviso declares the person to be the sub-tenant of the reinstated tenant, in regard to the holding. Thus a privity of estate is established between the reinstated tenant and the sub-tenant in respect of the holding. The proviso says that the person so declared as a sub-tenant shall not be liable to ejectment for three years. It does not say that the person shall be declared as a sub-tenant for three years. The reason appears to be that if the sub-tenant had been given a fixed term tenancy for three years, he would not have been able to gain immunity from ejectment even for this period of three years. S 27(3) of the Amendment Act was a part of the U P Tenancy Act, 1939. In *Ramesh Chand v Board of Revenue* (1) a Full Bench held that s 27 deals with the ejectments effected prior to the amendment under ss 165, 171 and 180 of the principal Act. In a way s 27 was intended to amend the effect of ss 165, 171 and 180. S 27 was in substance a proviso to each of these three sections. The proceedings under s 27 of the Amendment Act are proceedings under the U P Tenancy Act, 1939. Thus the person who was declared as a sub-tenant will be deemed to be a sub-tenant within meaning of U P Tenancy Act, 1939 and its various provisions dealing with sub-tenants will be applicable. Under s 39(2) of the U P Tenancy Act a sub-tenant cannot sub-let a holding. S. 171 of the U P Tenancy Act provides for ejectment of tenants for illegal transfers, sub-let-

(1) AIR 1978 All 120 para 14 (F B)

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tings etc. If the declared sub-tenant were to illegally sub-let his holding he would be immediately liable to ejectment under s 171. But, the Legislature wanted to give a complete immunity from ejectment to such declared sub-tenants for three years. That is why it was expressly provided that such sub-tenant will not be liable to ejectment until after the expiry of three years from the date of the declaration. This was not with a view to confer a fixed term tenancy for three years, but to give him a prospective immunity from ejectment for three years in spite of his being a sub-tenant, who would have otherwise been liable to ejectment even prior to that term of years.

The matter can be looked at from a slightly different viewpoint. On the ejectment of a tenant if the land is let out to another tenant the newly inducted tenant becomes the hereditary tenant; but after reinstatement of the previous tenant what will be the status of the subsequently inducted tenant for the period between his induction and his declaration as a sub-tenant? This matter was considered by a Full Bench of this Court in *Ramesh Chand v Board of Revenue* (1). The Bench held that sub-s (5) of s 27 provides for the revival of the rights of ejected tenant. The effect is nullification of operation of the decree for ejectment. With the revival of the tenancy rights of the ejected tenant, the position would be that the person who was inducted later would no longer be entitled to the rights and status of the hereditary tenant. The necessary consequence and effect of the revival of the rights would be the nullification of whatever rights may have initially accrued to the subsequently inducted person. The nullification is co-extensive with the revival. Since the pre-existing rights and liabilities of the original tenant

(1) A I R 1970 A 1 130 para 14 (F B)

revive, their revival can be effective only if the nullification of the rights and obligations of the subsequently induced tenants is co-extensive in duration. The subsequently induced tenant could not hence validly say that he was ever the hereditary tenant of the holding. The Full Bench observed

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"The question then arises as to the status of the subsequently induced person. It has been seen that his status as a hereditary tenant is nullified by the order of reinstatement. Under the proviso to s 27(3) the Court is to declare such person as the sub-tenant of the applicant, entitled to remain in possession for a fixed period of three years from the date of the declaration. The proviso does not expressly say that the declaration as a sub-tenant is to be prospective. The only prospective provision is about exemption from liability to ejectment for three years from the date of the declaration. In our opinion, the proviso ought to be read as having the effect of a retrospective declaration as a sub-tenant with a prospective immunity from ejectment for three years. Read this way, the proviso has the merit of not leaving a vacuum in regard to the period between his induction and the date of the declaration as sub-tenant. The declaration as sub-tenant is effective for this prior period as well with the result that for this intervening period the applicant remains the hereditary tenant, the subsequently induced person being his sub-tenant."

Since the sub-tenant is deemed to be a sub-tenant for this prior period as well it cannot be said that the declaration is as a sub-tenant for a fixed period of three years. It is true that the sub-tenant gets an immunity

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from ejectment for three years, but his term as a sub-tenant is bound to be much larger because of the inclusion of the preceding period of time in the sub-tenancy. The preceding period is liable to vary from case to case, depending on the date of his induction and the date of declaration. In some cases it may be an year only and in some others it may be several years. It is hence not possible to predicate any certain period for which the subsequently inducted person would be deemed to have been declared a sub-tenant. This also goes to show that the declaration as a sub-tenant is not for any fixed period. In agricultural tenancies if the term is not fixed, the tenancy is from year to year. In *Aziz Alam v Deputy Director of Consolidation* (1) a Full Bench held that in *Unchan Singh v Board of Revenue* (2), the *asami* held land for a fixed term of three years under the proviso to s 27(3) of the Amendment Act, 1947. A perusal of the decision in *Unchan Singh's* case (2) shows that the Bench did not discuss the question whether the person declared under the proviso to s 27(3) was a sub-tenant from year to year or for a fixed term. But that seems to be the assumed implication in the decision. This view and its implied approval in *Aziz Alam's* case (1) does not lay down the law correctly.

In *Purai v Deputy Director of Consolidation* (3) a Bench held that the question whether an *asami* holds from year to year or not is to be gathered from the terms of s 21 of the U P Act No I of 1951 and that only *asamis* of certain categories have been classed as *asamis* from year to year and the *asamis* outside these categories cannot be classed as *asamis* from year to year. According to this decision only *asamis* mentioned in s 21(2)

(1) 1972 R D 266 (F B)

(2) 1962 A L J 229,

(3) 1970 R D 249

(occupants of grove land) would be *asamis* from year to year while all other cases of *asamis* mentioned in various clauses of s. 21(1) will not

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Sub-s (2) makes persons recorded as occupants of grove land in the revenue papers of 1356F *asami*, entitled to take or retain possession from year to year. Since under this provision occupants, namely, trespassers who had no pre-existing legally recognised interest in the land were conferred the status of *asamis*, it became necessary to specify the term which they would be entitled to hold the land as *asamis*. Sub-s (1) of s. 21, however deals with various categories of tenants, and, persons who had subsisting rights in the land on the date immediately preceding the date of vesting. It deals with various kinds of tenants, viz, a non-occupancy tenant, a sub-tenant of grove land, a sub-tenant referred in the proviso to sub-s (3) of s. 27, a mortgagee in possession, a non-occupancy tenant of pasture land, a non-occupancy tenant of land set apart for taungya plantation and tenant of *sir* etc. Since these categories of persons had the right to hold the land either from year to year or for a fixed term depending upon their pre-existing law and their contract, the Legislature did not specify the term of these persons; because it did not intend to effect any change in their terms. The categories of persons mentioned in sub-s (1) stand in an entirely different position than the trespassers covered by sub-s. (2). Hence from the provision of an year to year term for the trespassers mentioned in sub-s. (2), an implication that all the categories of tenants mentioned in various clauses of sub-s. (1) will have a fixed term tenancy cannot be inferred. The question whether a person declared to be sub-tenant under the proviso to s. 27 (3) holds land from year to year or for a fixed term will

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depend upon a consideration of that provision and not upon s 21

The second question is whether the amendments introduced to serial no 25(2) of the third appendix of the Zamindari Abolition Rules by the notification dated 16th November, 1954 were retrospective in operation? S 202 provided for the ejectment of *asamis* Cl (b) thereof referred, *inter alia*, to such declared subtenants Col 4 of En 25(11) in App III of the Zamindari Abolition Rules prescribed the period of limitation of one year for a suit under s 202(b) and under col no 5 the time began to run

“From the date on which the cause of action arose under s 202(b)”

By a notification dated 8th October, 1952, the U P Legislature amended the Zamindari Abolition Rules. Para 42(1) of this notification stated

“For the existing entry in col 5 against serial number 25(11) the words from the date of vesting where the cause of action arose under s 202 (b) before the date of vesting and in all other cases from the date on which the cause of action arose’ shall be substituted.”

The prescribed period of one year continued as before. So, in case where the cause of action for ejectment of an *asami* under s 202(b) arose before the date of vesting, the suit had to be filed within one year from the date of vesting. Thereafter it would be barred by limitation. If no such suit was filed by 30th June, 1953, the erstwhile *asami* became a *sirdar* under s. 204 of the Act. By a notification dated 20th November, 1954, entry no 25(ii) was again amended. Para. 6(3) of this notification provided:

“The existing entries in cols. 4 and 5 against the item (ii) of serial no. 25 shall be deleted and

the word 'none' shall be inserted in both the columns."

The result was that the provision of one year's period of limitation was repealed and so was the requirement that time was to run from the date when the cause of action arose

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On behalf of the appellants it was urged that the amendment made in entry no 25(11) on 20th November, 1954, operates prospectively. It will not revive causes of action which had become dead because suits thereon had become barred by limitation before the amendment came into force. This amendment does not by its language purport to take away rights of a *sirdar* which had already accrued and vested in the erstwhile *asami* under s 204 of the Act. Learned counsel invited our attention to *Uchan Singh v Board of Revenue* (1). This case fully supports the submission. In this case *V Bhargava, J* speaking for the Bench held that the amendment introduced in the Appendix changing the period of limitation did not purport to be retrospective at all, although, if it was retrospective, a further question may arise whether the State Government exercising delegated authority to make rules had the power to legislate retrospectively in the matter of limitation. This decision was followed by another Division Bench in *Purai v Deputy Director of Consolidation* (2) and in *Gauri Shanker Pandey v Deputy Director of Consolidation* (3) and also by the Board of Revenue in *Hari Ram v Zakia Begum* (4).

Learned counsel for the respondents, however, urged that in its very nature the amendment was retrospective because otherwise the amendment would be infructuous. The object of benefiting the rein-

(1) 1962 A L J 229

(3) 1970 R D 817.

(2) 1970 R D 249

(4) 1970 R D 380.

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stated tenant would be defeated in a very large number of cases. There will hardly be some rare cases in which the orders of reinstatement have been passed after 1950 so that the cause of action for a suit for ejectment may survive till the amendment of 20th November, 1954. The law is not amended for the benefit of rare cases but for the benefit of the people in general. Learned counsel placed reliance upon the decisions of the Board of Revenue in *Ram Singh v Laxmi Narain* (1) and *Dansantu v Jhangar* (2) and a single Judge decision of this Court in *Khubi Singh v Joint Director* (3).

The primary question is whether the State Government exercising delegated authority to make rules had power to legislate retrospectively. The law on this point has been declared by the Supreme Court in *Income-tax Officer, Alleppy v M C Ponnoose* (4). *Grover, J* speaking for the Court, observed (para 5)

"Now it is open to a sovereign Legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are—in the words of *Willes, J* in *Philips v Eyra*, (5) 'no doubt *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'. The courts will not, therefore, ascribe retrospectively to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legis-

(1) 1957 R.D. 373.

(3) 1968 R.D. 23.

(2) 1959 R.D. 245

(4) A.I.R. 1970 S.C. 385

(5) (1870) 40 L.J.Q.B. 28 at 37



lative power within the recognised limits  
Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or by law which can operate with retrospective effect. See *Subba Rao, J*, in *Dr Indramani Pyarelal Gupta v W R Nathu*, (1) the majority not having expressed any different opinion on the point, *Modi Food Products Ltd v Commr of Sales Tax*, U P (2), *India Sugar Refineries Ltd v State of Mysore* (3), and *General S Shrivdev Singh v State of Punjab* (4), "

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So subordinate legislation can be retrospective only if it is authorised either in express terms or by necessary implication flowing from the statutory provisions. In view of this Supreme Court decision the contrary opinion expressed in *Prithvi Chand v Union of India* (5) cannot be accepted as laying down correct law.

Chap VIII of the U P Zamindari Abolition and Land Reforms Act consists s 129 to 230. Ss 202 and 204 are in this chapter. S 230(1) provides that the State Government may make rules for the purpose of carrying into effect the provisions of this chapter. S. 344(1) (d) of the Act provides that every power to make

(1) (1963) 1 SCR 721 AIR 1963 All 35  
1963 SC 274 (4) (1959) 61 Pun LR 514  
(8) AIR 1960 Mys 826 AIR 1959 Pun 453 (FB)  
(5) AIR 1967 Pun 195 at 198

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rules given by this Act shall be deemed to include the powers to provide for the time within which suits, applications and appeals may be presented under this Act, in case for which no specific provision in that behalf has been made herein S 344(3) lays down that all rules made under this Act shall be published in the official *Gezette*, and shall, unless some later date is appointed, come into force on the date of such publication

The legislature delegated to the State Government power to make rules for carrying into effect the provisions of the Act To that end it would prescribe the period of time within which suits, etc may be filed except cases for which specific provision in that behalf has been made under the Act

S 202 provides for the ejectment of *asamis* S 204 says that if a suit for ejectment of an *asami* of the classes mentioned therein is not instituted, or a decree obtained under such suit is not executed, within the period of limitation prescribed therefor, the *asami* shall, on the expiry of that period, become a *sirdar* of the land held by him Ss 202 and 204 are thus inter-related provisions When s 230 confers rule-making power for the purposes of carrying into effect the provisions of this chapter, it obviously means the carrying into effect of every section in that chapter If a landholders fails to file a suit under s 202 within the prescribed period of time, s 204 confers upon the *asami* the status and rights of a *sirdar* The rules made under s 230 will have to carry into effect the provision of s 204 as well If a particular rule has the effect of nullifying the right of a *sirdar* which has accrued under s 204, it will not be carrying into effect the provisions of s 204 but rather contravening it or demolishing its efficacy It has been held that where a power to make regulations is given by a statute, no regulations made

under the statute can abridge a right conferred by the statute itself, see *R v Bird, Needa 'Exp* (1) In *Madurai Pillai v Muthu Chetty* (2) a full Bench held that any rule which would abridge a substantive right granted by a statute would be *ultra vires* unless the statute itself empowered the rule-making authority to alter the provisions in the statute Neither s 230 nor s 344 even whisper the grant of a rule-making power to alter the provisions of the Act

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In the *Delhi Laws Act* case (3) and *Raj Narain Singh v Patna Administration Committee* (4) the question was whether laws which provide that certain laws could be applied to certain areas with such modification as the executive authority deemed fit to make, were constitutionally valid There was specific authorisation to apply laws with modifications which the executive authority may deem fit to make The Supreme Court held that such authorisation will not extend to repealing laws already in force in the area and substituting other laws with or without modifications Further, the modification in law to be applied could not effect any essential change in the law and alter its policy Where delegation authorises the making of a radical change in the policy of the law to be applied, such an authority could not be delegated and its delegation was *ultra vires* These authorities establish that even if the Legislature wants, it cannot delegate power to a subordinate authority to alter the policy laid down by the Legislature Here the Legislature enunciated its policy conferring the status and rights of a *sardar* upon an *asami* if a suit for his ejection is not brought within the prescribed period The power to make rules to carry into effect these provisions could not possibly be held to include a power to alter this basic and

(1) (1899) 2 Q B 840  
(3) 1951 S C R 747

(2) A I R 1964 Mad 287  
(4) A I R 1954 S C 569

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fundamental policy of the Legislature The rule-making power could not hence extend to nullifying the effect of s 204 of the Act

The amendments made in 1954 being in regard to a matter of procedure like prescribing the period of limitation for a suit may, under the general principles of construction, be retrospective in operation, inasmuch as they may apply to suits filed after their coming into force although the cause of action for such suits may have accrued prior to that date But they cannot be recognised to have a retrospective operation which would divest persons of rights vested in them under s 204 If in a given case the cause of action for a suit for ejectment of an *asami* has perished because of the lapse of the prescribed period of limitation, with the consequence that the *asami* had become a *sirdar*, the amendments made in 1954 could not revive such a cause of action If by any process of reasoning the amendment is construed as having such a retrospective effect, it will be *ultra vires* the rule-making power

Under the unamended rule the period of limitation was one year and the time commenced to run when the cause of action arose There was divergence of opinion in this Court as to when does cause of action arise In *Unchan Singh's* case (1) it was assumed without discussion that where the three year period of sub-tenant expires before the date of vesting the cause of action would arise on the date of vesting and a suit for his ejectment as an *asami* would become barred by time on 1st July, 1954 In *Zahid Ali Khan v Saktey* (2) a learned single Judge held that a tenure which is held from year to year must first be determined by the land-holder in order to be furnished with a cause of action for a suit for ejectment By mere

(1) 1962 A L J 229

(2) 1968 R D 387

inaction, i.e. by not entering into a fresh agreement of tenancy on the expiry of any particular year, it cannot be said that the land-holder gets cause of action as soon as the year expires. In *Ghazi v Waqf Alalaulad* (1) a Division Bench held that where a lease in favour of an *asami* is from year to year it cannot be said that the cause of action arises at the end of every year. A person holding the land year after year has a right to continue in possession till the lease is determined. For so long as there is no determination of the lease, the lessee can remain in possession and hence no cause of action can be deemed to have arisen for the ejectment of the person in possession.

The decision of the learned single Judge in *Zahid Ali's case* (2) was considered by a Division Bench in *Smt Vidyavati v Board of Revenue* (3) and was overruled. The Bench held that though under the Transfer of Property Act a notice under s 106 was necessary to terminate a tenancy before a suit for eviction of a tenant was filed, there is no corresponding provision in the Zamindari Abolition Act. S 190 of the Zamindari Abolition Act lays down when the interest of an *asami* shall be extinguished. It does not provide that the interest of an *asami* can be extinguished by giving of a notice by the land-holder. On the other hand, cl (e) provides that the interest of an *asami* shall be extinguished when he is ejected under the provisions of this Act. Till he is evicted by executing a decree obtained in a suit filed under s 202, he continues to be an *asami*. It is therefore, manifest that the giving of a notice cannot at all affect the rights of an *asami* and cannot put an end to the *asami* tenure. It was held that it was not necessary for the land-holder to give any notice to the *asami* determining his right before a suit under s 102 can be filed. In this case the contrary Division Bench decision in *Ghazi v. Waqf Alalaulad* (1) was not noticed.

(1) 1960 A W R. 602

(2) 1968 R D 367

(3) 1972 R D 203.

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It is true that the Zamindari Abolition Act does not specifically prescribe a notice prior to the institution of a suit for ejectment of an *asami*. S 184 of the Zamindari Abolition Act, however, provides that an *asami* may surrender the whole of his holding by giving a notice in writing to the Land Management Committee or the land-holder, as the case may be, intimating his intention to do so and by giving up possession thereof. S 82 of the U P Tenancy Act, 1939, made a similar provision for surrender by tenants. From this a corresponding duty in the land-holder not to evict without notice can be inferred on the line of reasoning that appealed to a Bench of the Calcutta High Court in *Chaturi Singh v Makund Lall* (1). S 20 of the Bengal Act 8 of 1869 provided that *ryots* cannot relinquish without a notice to the landlord. The Bench held

"In our opinion it follows from this, that a landlord cannot evict such a tenant without a notice, because, in order to justify an eviction without a notice, it must be held that the tenancy, unless renewed, comes to an end at the end of the year. But if that were so the *ryot* could throw up the land without a notice

The relation of landlord and tenant cannot be said to have ceased so far as the landlord's right to evict is concerned, but not with reference to the *ryot's* right to relinquish. But seems to us, that the relationship does not come to an end at the expiration of each year, without some act on the part of the landlord and tenant jointly, or of either."

This controversy was set at rest by a Full Bench of this Court in *Aziz Alam v Deputy Director of Conso-*

ludation (1) S. N. DWIVEDI, J referring to entry 25 (ii) of App. III, held that there the sub-tenant holds land from year to year the cause of action will arise only when the landholder has determined the lease In such a case time would run from the day on which the lease ceases to have effect If no suit is instituted within limitation, the *asami* would become a *sirdar*. Thus a suit for the ejectment of an *asami* holding from year to year will not become barred by time on 1st July, 1954, unless the landholder has determined the tenancy more than one year prior to that date

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In the result, the answers to the questions are

(1) A person declared to be sub-tenant under the proviso to sub-s (3) of s. 27 of the U. P. Tenancy (Amendment) Act, 1947, holds the land from year to year

(2) The amendments introduced to serial no 25(ii) of the third appendix to the Zamindari Abolition Rules by the notification dated 20th November, 1954, are not retrospective in operation, so as to defeat vested rights

R. B. MISRA, J.—I agree

K. N. SETH, J.:—I agree

A. BANERJI, J.:—I agree

H SWARUP, J.:—The two questions which have been referred to the Full Bench for opinion are:

(1) Whether persons declared to the sub-tenants under the proviso to sub-s (3) of s 27 of the U. P. Tenancy (Amendment) Act, 1947, hold the land from year to year or for a fixed period within the meaning of s. 202(b) of the U. P Zamindari Abolition and Land Reforms Act ?

2. Whether the amendments introduced to

(1) 1979 R D 266

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serial no 25(2) of the third appendix of the U P Zamindari Abolition and Land Reforms Rules by the notification dated 16th November, 1954, were retrospective in operation ?

Under the original s 171 of the U P. Tenancy Act if a tenant transferred or sub-let the whole or any portion of his holding otherwise than in accordance with the provisions of the Act and the transferee or sub-lessee entered into possession in pursuance of the transfer or sub-lease, both the tenants and the person let in were liable to ejectment from the area so transferred or sub-let. The respondent in the present case was an occupancy tenant and had let out the land to some one and was therefore on the suit of the Zamindar ejected from the land in dispute. This happened in 1944. The present appellant was then inducted as a tenant by the Zamindar and he remained in occupation.

The U. P. Tenancy Act was subsequently amended in 1947 by the U P Tenancy (Amendment) Act, 1947. The relevant section is s 27 of this Act. The relevant portion of the section runs as follows:

*"Reinstatement of certain ejected tenants—(1)* if, on or after the first day of January, 1940, any person was ejected from his holding or any part thereof.

(a)

(b) under s 171 of the said Act, otherwise, than on the ground of an illegal transfer by way of sale or gift,

he may apply, within six months from the date of the commencement of this Act to the court which passed the decree for his ejectment, for reinstatement, in such holdings or part thereof, as the case may be."



Sub-s. (3) and (5) of s 27 run as follows.

(3) on receipt of an application under sub-s (2) the court shall give notice to the landholder and to the tenant, if any, in possession of the whole or part of such holding After making such enquiry as may be necessary, if the court is satisfied that the applicant was so ejected or dispossessed, it shall order that the applicant be reinstated in such holding or part thereof, as the case may be, and that any other person in possession of it be ejected therefrom

Provided that if such holding or any part thereof is in the possession of any person to whom the landholder had let it out before the first day of September, 1946, such person not being a relation, dependant or servant of the landholder, the court instead of ordering the ejectment of such person shall, notwithstanding the provisions of any law for the time being in force, declare him to be the sub-tenant of the applicant in respect of such holding or such part The person so declared as a sub-tenant shall not be liable to ejectment until after the expiry of three years from the date of the declaration

(5) On reinstatement, the rights and liabilities of the applicant existing on the date of his ejectment or dispossession in respect of the holding or any part thereof from which he was ejected or dispossessed, shall revive subject to the proviso to sub-s. (3)

The ejected tenant filed an application under s 27(1) for his reinstatement and the court gave him the declaration about reinstatement, but in view of the proviso to sub-s (3) of s 27 declared

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the appellant as sub-tenant of the respondent and did not pass the order ejecting him

Under the U P Zamindari Abolition and Land Reforms Act (hereinafter called the Act), the original tenant who had been reinstated by the order under s 27 became the *sirdar* by virtue of s. 19 of the Act and the sub-tenant became *asami*

S 21(c) of the Act says:

"Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as

\* \* \* \*

(c) a sub-tenant, referred in the proviso to sub-s (3) of s 27 of the United Provinces (Tenancy Amendment) Act, 1947,

\* \* \* \*

shall be deemed to be an *asami* thereof"

The relevant portion of s 133 states:

"Every person belonging to any of the following classes shall be called an *asami* and shall have all the rights and be subject to all the liabilities conferred or imposed upon *asamis* by or under this Act, namely,—

(a) every person who, on the date immediately preceding the date of vesting, occupied or held land

\* \* \* \*

(iii) as a sub-tenant under the provision of sub-s (3) of s 27 of the United Provinces Tenancy (Amendment) Act, 1947,"

Subsequently, cl. (a) of s 133 was amended to read as follows:

"133. (a) every person who, as a consequence of the acquisition of estate, becomes an *asami* under s 11, 13 or 21;"

The relevant portion of s. 202 of the Act provided for the ejectment of an *asami*. It said:

"Without prejudice to the provisions of s 338 an *asami* shall be liable to ejectment from his holding on the suit of the landholder, on the ground or grounds

\* \* \* \*

(b) that he belongs to any of the clauses mentioned in sub-cls (i), (ii), (iii), (vi) and (vii) of cl (a) or in cl (c) of s 133 and that he holds the land from year to year, or for a period which has expired or will expire before the end of the current agricultural year."

Sub-s. (b) of s 202 was subsequently amended and was substituted by

"that he belongs to any of the classes mentioned in cls (a), (b), (c), (e) and (g) of sub-s (1) of s 21 and that he holds the land from year to year, or for a period which has expired or will expire before the end of the current agricultural year "

S 204 of the Act provided for the consequences of not filing a suit for the ejectment of the *asami*. It provided:

"If a suit for ejectment of an *asami*, to whom any of the sub-cls (i) to (v) of cl (a) or cl. (b) of s 133 applies, is not instituted, or a decree obtained in such suit is not executed, within the period of limitation prescribed therefor, the *asami* shall

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on the expiry of the period, become a *sirdar* of the land held by him "

Consequent to the amendment of s 202, s 204 was also amended in 1958 by making it read as under:

"If a suit for ejectment of an *asami*, to whom any of the cls (a), (b), (c) or (d) or s 21 or s 11 applies, is not instituted, or a decree obtained in such suit is not executed, within the period of limitation prescribed therefor, the *asami* shall, on the expiry of the period, become a *sirdar* of the land held by him "

R 338 provided that suits, applications and other Proceedings specified in third appendix shall be instituted within the time specified therein for them respectively Serial no 25(2) in App. 3 deals with suits under s 202 of the Act and provide one year's limitation for the institution of a suit for ejectment of an *asami*. The time was to run from the date on which the cause of action arose under s 202(b). This rule was subsequently amended by a notification dated 8th October, 1952 and the entry was changed as under.

"From the date of vesting where the cause of action arose under s 202(b) before the date of vesting; and in all other cases, from the date on which cause of action arose "

Subsequently, in 1954, serial no 25 was again amended and instead of the period of limitation being one year it was mentioned as 'none'. It is in view of the provisions mentioned above that the two questions have to be considered

S. 171 of the U P Tenancy Act was implidly amended by the U P Tenancy (Amendment) Act of 1947 and s 27 was made applicable to all transactions which took place on or after the first day of January, 1940. The effect was to put back the ejected tenant in pos

session. In case, however, some person had been inducted by the Zamindar in accordance with law as it then stood, as a tenant he was permitted to continue for three years from the date of the order passed on the application moved by the ejected tenant under s 27 of the Amendment Act. If the person so inducted was the relation, etc. of the Zamindar, he had to be ejected immediately. A sort of statutory tenancy was created by the proviso to s 23 and the status of the occupant was declared as sub-tenant. In the ordinary course, he would have been liable to ejectment in the same proceedings because a tenant had a right under the U. P. Tenancy Act to eject the sub-tenant without any notice. Through the proviso, however, a statutory protection was given to a person declared sub-tenant to continue in possession for three years. In all other respects, the rights of the tenant who had been ejected were revived. He became entitled to get from the occupant at the rate prescribed by the statute. The occupant did not get any interest in the property occupied by him except the right of not being liable to ejectment for three years from the date of declaration.

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The contractual tenancy in favour of the occupant created by the Zamindar was put an end to by an order reinstating the original tenant. The occupant was thus left with no rights under that contract. For the protection of the occupant, the proviso imposed a prohibition against the recovery of possession of the holding for a fixed period of three years. As observed in *Anand Niwas v Anand Jee* (1):

“A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly

(1) A.I.R. 1966 H.C. 414 at p. 422 para 27

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though in law not accurately, called a statutory tenant'. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided in the statute. The right of a lessee from a landlord on the other hand is an estate or interest in the premises and in the absence of a contract to the contrary is transferable and the premises may be sub-let by him. But with the determination of the lease, unless the tenant acquires the right of a tenant holding over, by acceptance of rent or by assent, to his continuing in possession by the landlord, the terms and conditions of the lease are extinguished, and the rights of such a person remaining in possession are governed by the statute alone."

It is thus clear that the occupant, though called a sub-tenant, became only a 'statutory tenant' with the rights given in the proviso. The declaration that he is the sub-tenant is only for the period of three years during which his sub-tenancy continues under the proviso, and the terms under which he holds the sub-tenancy are given in the proviso itself.

S. 295-A added by U. P. Tenancy (Amendment) Act of 1947 provides:

"Notwithstanding any contract to the contrary or anything contained in this Act or any other law for the time being in force, every person,

who, on the date of commencement of the United Provinces Tenancy (Amendment) Act, 1947, is a sub-tenant shall, subject to the provisions of the proviso to sub-s (3) of s 27 of the United Provinces Tenancy (Amendment) Act, 1947, be entitled to retain possession of his holding for a period of five years from that date, and for this period nothing in sub-s (2) of s 44 or s 171 shall render the landholder of such sub-tenant liable to ejectment under the provisions of s 171:

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“Provided that nothing in this section shall authorise a sub-tenant of a person who belongs to one of the classes mentioned in s 41 to retain possession of his holding after the disability of such person has ceased”

Reading s 295-A with s 27 shows that a person who was holding as sub-tenant on the basis of a contract was permitted to continue in possession for a period of five years, but a person who was made a statutory tenant by virtue of proviso to sub-s (3) of s 27 was given a right of occupancy only for three years. In either case, the right of the occupant was only to remain in occupation as sub-tenant for a fixed period.

There is no provision in the U P Tenancy (Amendment) Act or in the parent Act providing for conversion of the statutory tenancy automatically into a contractual tenancy from year to year or for any other period. Hence, merely by continuing in possession after the expiry of three years a person declared as sub-tenant under the proviso cannot acquire any further sub-tenancy.

The right to eject the occupant was postponed by the proviso for a period of three years. As soon as the period of three years expired, the right to eject revived.

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This is the date which the original tenant got the right to institute proceedings for his ejectment. It would be this date on which the occupation of the declared sub-tenant will become without authority of law that the cause of action for his ejectment will arise. If the tenant had instituted proceedings for his ejectment before the vesting under the U P Zamindari Abolition and Land Reforms Act the cause of action would have been deemed to have arisen on the date the bar created by the proviso to s 27(3) had ceased to be operative. As there was no provision in the U P Tenancy Act, for giving a prior notice for initiating proceedings for ejectment of a sub-tenant or for termination of sub-tenancy, there could be no other date creating the cause of action for proceedings to eject such a sub-tenant. The cause of action for ejectment of a sub-tenant under the proviso to sub-s (3) must therefore be deemed to arise immediately after the expiry of three years from the date of declaration under the proviso.

The U P Zamindari Abolition and Land Reforms Act had created new rights and made also the persons who had been declared sub-tenants under the aforesaid proviso, *asamis* of the tenants who become *siddaris* under s 19 of the Act. But the right to eject such an *asami* was continued. The sub-tenant was given the new status of *asami*, even though the cause of action for his ejectment may have arisen even prior to the enactment. This is clear from cl (b) of s 202 of the Act. The right to eject an *asami* was



confined by s 200 of the Act to the manner provided in s 202 and no suit or proceedings were permitted to be initiated by a *sirdar* for ejectment of an *asami* by virtue of his right to eject him under the U P Tenancy Act Cl (b) of s 202 gave the power to eject *asami* under three conditions

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- (1) That he held land from year to year
- (2) That he held land for a period which had expired
- (3) That he held land for a period that would expire before the current agricultural year

If the period of three years had expired prior to the enforcement of the Act, the *asami* was made liable to ejectment within the period of one year from the date on which the cause of action arose under s 202 (b). The limitation as it stood at the commencement of the Act and the Rules was thus to run from the date of the cause of action, i e the date on which the period of three years had expired. This had given different period of limitation for institution of suits under s 202 (b) even though fresh rights of *asami*, *sirdar* and *Bhumidhar* had been created by the Act. To remove this discrepancy and to make the law operate evenly, the entry no 25 in the App. III of the Rules was amended in the manner indicated above and the limitation in all cases where the cause of action had arisen prior to the enforcement of the Act, was made one year from the date on vesting. This was

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made only in respect of those matters where the cause of action had arisen for a suit under s 202(b) before the date of vesting. In other respects the date on which the cause of action arose was made the point of time for the commencement of limitation. This amendment had the effect of giving a fresh start to limitation and of arresting the limitation which had already begun to run prior to vesting. After the year from the date of vesting had come to an end, in all cases in which suits had not been instituted the *asamis* had gained higher rights by virtue of the provisions of s 204 of the Act. There thus remained no question of institution of any suit under s, 202 (b) against those *asamis* the period of whose lease had expired before the date of vesting and cause of action had arisen before that date. This clause, therefore, became redundant and it was for this reason that it was later on dropped and the Rules gave an unlimited period of limitation to *sirdar* for filing suits against *asamis*.

The question of the amendment being applied retrospectively becomes immaterial in view of the provisions of s 204 in respect of those sub-tenants for whom cause of action had already arisen prior to the date of vesting. After one year of vesting they acquired *sirdari* rights and the *sirdars* had lost their rights. The circumstances changed so as to leave no scope for filing of any suit for ejectment to those *asamis* for

whom the cause of action had arisen prior to the date of vesting. The Legislature had already by enacting s 204 and fixing a one year's limitation conferred higher rights on *asams* and these rights cannot be wiped off by an amendment of the Rules regarding limitation for institution of suits

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Accordingly, with respect to question no 1. I come to the conclusion that the person declared to be sub-tenant under proviso to sub-s (3) of s 27 of the Act holds the land for a fixed period within the meaning of s. 202 (b) of the Act and not from year to year I give my opinion accordingly

As regards the second question, my opinion is that the amendment of the entry at serial no 25 of the third appendix to the U P Zamindari Abolition and Land Reforms Rules by the notification dated 16th November, 1954 does not authorises the institution of a suit for ejectment of a sub-tenant declared under s 27 of the U P Tenancy (Amendment) Act, 1947 in whose case declaration had been made more than three years prior to the date of vesting

By the Court—The questions referred to this Full Bench are answered as follows :

*Question no 1.*—A person declared to be sub-tenant under the proviso to sub-s. (3) of s 27 of the U. P Tenancy (Amendment) Act, 1947, holds the land from year to year

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*Question no 2*—The amendments introduced to serial no 25(11) of the third appendix to the Zamindari Abolition Rules by the notification dated 20th November, 1954, are not retrospective in operation so as to defeat vested rights

*Questions answered*

## APPELLATE CIVIL

*Before Mr Justice Yashodanandan and Mr Justice  
H Swarup*

GAON SABHA, BHAGWANPUR

APPELLANT,

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*v*

July, 18.

TEHSILDAR AND ASSISTANT COLLECTOR,

ROORKEE AND OTHERS

RESPONDENTS.

**Rural Development (Requisitioning of Land) Act, 1948,**  
*s 2(2)(iv)—Requisition of land for instructional farms—  
Covered by public purpose—Valid*

Instructional farms for the purpose of development of agriculture would be covered by the definition of public purpose and consequently requisition of the land for the establishment of demonstrational and instructional agriculture farm for the purpose of the village agricultural school would be requisition for a public purpose. The requisition of land for agricultural farm will therefore, be valid.

——, *s 2(2)(b)—Agriculture will not include pisciculture—  
The meaning of the agriculture used in the Act cannot include  
within its ambit the term pisciculture*

The definition of the land including tank does not speak about the purpose the tank has to be utilised, and hence the definition of the land as including tank cannot lead to the conclusion that agriculture includes pisciculture.

Special Appeals Nos 461 and 462 of 1968 from the judgment and order of *s CHANDRA, J* in Civil Miscellaneous Writ No 4174 of 1967.

*K C Agarwal*, for the Appellant

*Bharati Agarwal and S C*, for the Respondents

H SWARUP, J.—These two special appeals have been filed against the judgment of the learned single Judge by which he dismissed the writ petitions filed by Gaon Sabha, Bhagwanpur. The petitions had been filed challenging two orders issued by the Requisition-

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ing authority appointed under the provisions of the Rural Development (Requisitioning of Land) Act, 1948 directing the land included in either of the two orders to be delivered to the Manager, D A. V Higher Secondary School, Bhagwanpur The order was passed under s 3 of the Act As the two writ petitions were decided by a common judgment by the learned single Judge we also decide these two appeals by this judgment.

The Dayanand Anglo Vedic Higher Secondary School situate in village Roorkee made two applications before the Block Development Officer, Bhagwanpur for requisitioning the plots in question These applications were made under s 6 of the Act One application related to plot no 185. The school needed this plot for establishing a demonstrational farm The school imparts education in agriculture and needed the land for the purpose of establishing an instructional and demonstrational agricultural farm The other application related to 13 plots They constituted a big tank and the tank was claimed by the school for the purpose of establishing a demonstrational farm of pisciculture Both these applications were forwarded by the Block Development Officer to the Requisitioning Authority for necessary action

The Requisitioning Authority instead of dealing with the applications under s 6 of the Act proceeded under s 3 of the Act. Notices were issued under s 3 to the Gaon Sabha and after hearing objections, the impugned orders were passed requisitioning the land claimed by the school through the two applications Dissatisfied with the order the Gaon Sabha filed two writ petitions in this Court They have given rise to the two appeals before us

After hearing learned counsel for the parties we have come to the conclusion that Special Appeal No 461 of 1968 arising out of Writ Petition no 4174 of 1967 in

respect of plot no 185 should be dismissed and Special Appeal no 462 of 1968 arising out of Writ Petition no 4175 of 1967 relating to other plots be allowed

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Learned counsel has contended firstly, that the applications having been made under s 6 of the Act the requisitioning authority had no jurisdiction to pass final orders under s 3 of the Act. We see no force in this contention. S 6 permits certain persons to move the Requisitioning Authority to requisition any land for a public purpose. But that does not in any way restrict the power of the Requisitioning Authority to proceed under s 3 of the Act *suo motu*, for requisitioning the same land. The appellant has suffered no prejudice by action being taken under s 3 as opportunity of hearing had been provided to it by the Requisitioning Authority before final orders were passed.

The second contention of the learned counsel for the appellant is that the land was not required for any public purpose and hence the requisitioning orders are invalid. For this purpose the two orders have to be seen separately. One, in respect of the plot which was requisitioned for the purpose of establishing instructional and demonstrational farm for agricultural purpose and the other through which the land was requisitioned for the purpose of pisciculture.

Public purpose has been defined in s 2(2) of the Act as follows:

“public purpose” means for and in connection with any of the following subjects, that is to say:

- (i) . . . . .
- (ii) . . . . .
- (iii) . . . . .
- (iv) any other object which the State Government may after publication in the *Gazette* and

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after considering any objection or suggestion which may be received by notification in the *Gazette*, declare essential for the development of agriculture or improvement of the life of community in rural areas”

Utilizing the powers given to the State Government under s 2(iv) of the Act the State Government issued a notification on 7th December, 1957 (no 4685-R/ D C 601-50), declaring that (1) the laying of village paths and roads, (2) the establishing of instructional farms attached to village schools, and (3) panchayatghars or seed stores, to be objects essential for the development of agriculture and improvement of the life of community in rural areas. Hence the instructional farms for the purpose of development of agriculture would be covered by the definition of public purpose, and consequently requisition of the land for the establishment of demonstrational and instructional agricultural farm for the purpose of the village agricultural school would be requisition for a public purpose. The requisition of land for agricultural farm will, therefore, be valid.

The other requisitioning order deals with the land of a tank for the purpose of pisciculture. In our opinion pisciculture cannot be included in the term agriculture and requisition of land for that purpose will not be a requisition for public purpose within the meaning of the Act, and would be beyond the scope of the Requisitioning Authority's jurisdiction. Pisciculture means culture of fish i.e., maintaining of fish and helping in their growth. Agriculture according to Oxford English Dictionary means the science and art of cultivating the soil, including the allied pursuit of gathering in of the crops and the rearing of livestock, tillage, husbandry, farming (in the widest sense). The New International Dictionary defines agriculture as '1(a) science or art of





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agriculture We are unable to agree with this contention because a tank can be requisitioned but the purpose has to be that development of agriculture. The definition of the land including tank does not speak about the purpose the tank has to be utilised, and hence the definition of the land as including tank cannot lead to the conclusion that agriculture includes pisciculture.

The requisition of the 13 plots, therefore, cannot be held to be valid and the requisitioning order has to be quashed

In the results Special Appeal no 461 of 1968 arising out of Writ Petitions no 4174 of 1967 in respect of plot no 185 is dismissed Special Appeal no 462 of 1968 arising out of Writ Petition no 4175 of 1967 is allowed. The judgment of the learned single Judge in that case is set aside and the requisitioning order of the Requisitioning Authority with regard to the 13 plots for the purpose of pisciculture and directing the delivery thereof to the D A V Higher Secondary School passed under s 3 of the Act is quashed In the circumstances the parties are directed to bear their own costs

*Ordered accordingly*

### CIVIL REFERENCE

*Before Mr Justice K B Asthana and Mr Justice  
K C Agarwal*

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August, 23.

SYED HASHIM HUSAIN

AND OTHERS

APPLICANTS,

v.

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AND OTHERS

... RESPONDENTS.

*Mohammedan Law—Mutwalli in good health—Appointment of his successor to be effective after his death—Validity of.*

Appointment of a successor by a *mutwalli* in good health which would be effective after the death of the *mutwalli* does fall within the permissible limits of the Mohammedan Law *Held*, that the nomination of a successor by a *mutwalli* can be made even in good health, to take effect on death

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By nomination a *mutwalli* only proposes or selects his successor to exercise his duties as *mutwalli* on his death. He does not part with or delegate his functions as *mutwalli* during his lifetime. It is only this delegation or parting with duties by *mutwalli* during his lifetime in good health that is prohibited.

Civil Miscellaneous Application no 95 of 1971

*K C Saxena, S Haider and Shaukat Abidi*, for the Applicants

*Bashir Ahmad*, for the Respondents

K C AGARWAL, J —The present Miscellaneous Application no 1 of 1963 has been filed under s 76 of U P Muslim Waqf Act, 1960 (hereinafter referred to as the Act). The proviso to the aforesaid section gives power to the High Court to call for and examine the record of any case for the purpose of satisfying itself as to the correctness, legality or propriety of any award made under the Act.

Waqf no 388, known as 'Waqf Syed Altaf Husain, Varanasi City' is a public Waqf and had been published as such in the U P. Gazette, dated 23rd January, 1954 by the C R Central Board of Waqfs, Uttar Pradesh, Lucknow. The aforesaid waqf comprises of an *imambara* with a big hall, a room, mosque and a vacant piece of land, situated in mohalla Sarai Shitab Rai, Mutalliqa Roshan Katra, Varanasi. An application under s 63(5) of the Act was filed by the applicants for possession of the *waqf* properties detailed above on the ground that the Shia Central Board (hereinafter referred to as the Board) had appointed a committee of management consisting of the applicants as *mutwallis*, and as the possession of the opposite-parties was unauthorised and illegal the applicants were entitled to obtain possession

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from the opposite-parties. It was alleged in this connection in the aforesaid application that one Syed Ghulam Abbas, who was the last *mutwalli* of the said *waqf*, died on 30th May, 1960. As there was no deed of *waqf* laying down the line of succession to the *Mutawalliship* the office of *mutwalli* became vacant after his death. Opposite-parties 1 to 3 (hereinafter referred to as the opposite-parties), however, asserted that as they had been nominated by Ghulam Abbas to act as *mutwallis* after his death so by virtue of the said nomination they were entitled to function in that capacity. As the right of the opposite-parties to work and function as *mutawallis* was disputed by the Board, on being approached by some residents of Varanasi the Board passed a resolution dated 3rd March, 1963 under s 48 of the Act and appointed applicants 1 to 3, with two others, as members of the committee of management of the *waqf*. These two others, however, subsequently resigned. They were, therefore, not the members of the committee. The Board by the letter dated 19th March, 1963 authorised the applicants to have delivery of possession over the *waqf* properties, and as the opposite-parties did not hand over possession consequently the applicants filed an application under s 63(5) of the Act against the opposite-parties for an award to direct them to deliver possession of all the *waqf* properties accounts and cash. The said application was numbered as Reference no 7 of 1965. It was contested by opposite-parties 1 to 3. The tribunal by the award, dated 12th March, 1968 found in favour of the applicants and directed the opposite-parties to vacate possession of all the *waqf* properties. Against the aforesaid award an application under s 76 of the Act was filed in the High Court. The High Court by its judgment dated 24th January, 1969 found that as the term of the members of the committee who

had made the application had expired, they became *junctus officio*, hence no relief could be granted to those members on the basis of that application. The High Court refrained from making any observation on the merits of the grounds on which the Tribunal had passed the order holding the opposite-parties liable to hand over possession. It appears that the Board, after the aforesaid judgment of the High Court, passed a fresh resolution on 16th March, 1969 and appointed a fresh committee of management consisting of the present applicants as *mutwallis*. This resolution was passed in exercise of the power under s 48 of the Act on the assumption that as after the death of Ghulam Abbas there was a vacancy in the office of *mutwalli* so far as this *waqf* was concerned, and as Ghulam Abbas did not have any right to nominate any *mutwalli* after his death, therefore the opposite-parties could not lawfully claim themselves as *mutwallis*. It was after the passing of the aforesaid resolution that the present application to the tribunal for an award to direct the opposite-parties to deliver possession of all the *waqf* properties was made. The ground taken in the aforesaid application, as stated above, was that since the office of *mutwalli* was vacant and as the Board was entitled to appoint the applicants as *mutwallis* the applicants having been appointed as such and authorised by the Board to obtain possession, were making the application in that capacity.

The aforesaid application made by the applicants was contested by the opposite-parties. It was alleged in the written statement filed in reply to the said application that originally the properties under the *waqf* belonged to Smt Sakina Khanam who gifted them to Mirza Mumtaz Ali through a gift deed dated 13th July, 1907. Under that gift deed she had only directed him to take out Zuljinah procession under his control and management on the sixth day of Mohurram, as used to

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be taken out previously. Mirza Mumtaz Ali thus became the absolute owner of the properties. He nominated and appointed Mir Altaf Hussain as the first *mutwalli* under a *tauliatnama* dated 15th January, 1913 and conferred upon him the right to nominate and appoint his successor-in-office. Altaf Hussain remained as *mutwalli* till his death. He had, however, before his death and in his lifetime executed a document on 30th January, 1922 by which he nominated and appointed Syed Ghulam Abbas as his successor-in office. By the said document Altaf Hussain had conferred upon Ghulam Abbas all those rights, including the right of nomination and appointment of successor-in-office, which were possessed by him. After the death of Altaf Hussain the said Syed Ghulam Abbas became *mutwalli* and managed the *waqf* properties as *mutwalli* up to the year 1960. The Board, according to the case of the opposite-parties, also treated him as *mutwalli* of the said *waqf*. Syed Ghulam Abbas during his lifetime nominated and appointed opposite-parties 1 to 3 to succeed him as *mutwallis* of the said *waqf* and executed a registered *tauliatnama* on 1st March, 1953 in their favour. Ghulam Abbas died on the 3rd May, 1960 and since then opposite-parties 1 to 3 were in possession of the *waqf* properties and were discharging their duties as *mutwallis*, and have been managing the *waqf* properties properly. On these allegations the opposite-parties asserted that since they were in lawful possession of the *waqf* properties as *mutwallis* there was no occasion for the Board to exercise the power under s. 48 of the Act. It was further pointed out in this connection by the opposite-parties that the Board could exercise the power of making appointment of any person to act as *mutwalli* only when there was a vacancy, and further that in a case where a *waqf* has been created by a deed the said power could be exercised only when no one competent

to be appointed as *mutwalli* under the terms of the deed was available

The Board also filed a written statement and admitted in the same that Ghulam Abbas had been appointed as a *mutwalli* in the year 1922 and that he had been recognised as a *mutwalli* by the Board. It was, however, alleged by the Board that after the death of Syed Ghulam Abbas in 1960 there was vacancy in the office of *mutwalli* as nomination of the opposite-parties as *mutwallis* was without any authority of law

The tribunal by the award dated 23rd December, 1970 rejected the application of the applicant by holding that the opposite-parties having been nominated by Syed Ghulam Abbas during his lifetime came into possession of the properties of the *waqf* immediately on his death in the year 1960, and since the time of his death were acting as *mutwallis*, therefore they were *de facto mutwallis* in the beginning and having been permitted to remain in possession for a period of more than six years became *de jure mutwallis*. The tribunal, however, held that Syed Ghulam Abbas did not have any authority to appoint the opposite-parties as *mutwallis* by a will. According to the tribunal, as it had found that the nomination of the opposite-parties by Syed Ghulam Abbas as *mutwallis* was unauthorised and illegal, therefore the office of *mutwalli* became obviously vacant on the death of the aforesaid last *mutwalli*, Syed Ghulam Abbas

Aggrieved against the aforesaid judgment of the tribunal the present miscellaneous application has been filed in this Court

Sri K C Saksena, appearing for the applicants, argued that the only relevant finding against him given by the tribunal was on the question of limitation, and as, according to his submission, the tribunal erred in find-

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ing that Art. 120 of the Limitation Act applied to the facts of the present case, he argued that the finding of the tribunal on that point should be set aside. In this connection he further argued that there was no question of the opposite-parties having acquired the rights of *de jure mutwallis* due to the lapse of six years. He contended that under the Mohammedan Law the right of a *de facto mutwalli* has been recognised for a limited purpose, and in that limited capacity such a *de facto mutwalli* can only remain in possession of the *waqf* properties as manager, and can sue for its recovery or its dues until displaced by a *de jure mutwalli*. His submissions further in this connection were that as the rights of a *de facto mutwalli* are not recognised any further so as to mature into the rights of a *de jure mutwalli*, therefore the tribunal erred in finding that the applicants were not entitled to a direction for delivery of possession against the opposite-parties.

Sri *Bashir Ahmad*, appearing for the opposite-parties, did not only support the findings of the tribunal on the question of limitation and on the question that the opposite-parties being *de facto mutwallis* became *de jure mutwallis*, but also contended that the findings of the tribunal on various other issues were wrong. He urged that under the Mohammedan law a *mutwalli* can nominate his successor to function as *mutwalli* after his death. Therefore, as the opposite-parties had been nominated by Syed Ghulam Abbas during his lifetime to succeed him as *mutwallis* after his death, there was no occasion for the Board to exercise the power under s 48 of the Act. In this connection it was further urged by Sri *Bashir Ahmed*, in the alternative, that even if it be held that under the Mohammedan law there was no power in Syed Ghulam Abbas to nominate his successor in good health. The opposite-parties were working as *mutwallis* since 1960 and, therefore there was no



vacancy either in the year 1963 or in the year 1969 when the resolutions were passed by the Board exercising powers under s 48 of the Act. In this connection it was also argued that the present was a case which was further covered by the proviso to s 48 of the Act, and as the opposite-parties had been nominated as *mutwallis* under a deed, they being available the Board could not nominate any other person as *mutwalli*.

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We have heard the learned counsel for the parties at length. For the decision which we are going to take in the present case it will be better to deal with the question of the power of nomination of his successor under the Mohammedan law by a *mutwalli* during good health as a first point, as if it is held that such power exists it would not be necessary for us either to deal with the question of *de facto mutwallis* becoming *de jure mutwallis*, or that of the application of s 48 of the Act as argued by Sri *Bashir Ahmed*.

Before we deal with this legal aspect, it may be convenient to dispose of the factual controversy which has been attempted to be raised by Sri *K C Saksena*. He has argued in this connection that the nomination of *mutwallis* even before that of the opposite-parties by Ghulam Abbas was invalid. We, however, find a clear admission of the Board contained in para 4 of the written statement, that Ghulam Abbas was a *mutwalli* of the waqf up to the year 1960 when he died. The resolution of the Board making appointment under s 48 of the Act dated 3rd March, 1963, also not only admits that Syed Ghulam Abbas was the *mutwalli* working in that capacity up to 1960, but also that Ghulam Abbas, and before him Altaf Hussain, were *mutwallis*. A reading of this resolution clearly indicates that the Board has accepted that the *waqf* was lawfully created and that Ghulam Abbas was the last *mutwalli*.

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In view of the admission of the Board that Syed Ghulam Abbas was the last *mutwalli*, it is not possible to hold to the contrary. An attempt was made by Sri K C Saksena to argue that the admission of the Board is not binding on him and that he could challenge the appointments of Ghulam Abbas and Altaf Hussain as *mutwallis*. We do not agree.

On the question as to whether under Mohammedan law, and in the absence of any express directions given by the *wakf*, a *mutwalli* is competent to appoint a successor only when he is on his death bed, or whether such an appointment can be made by him also in good health, we have been referred to a considerable body of authorities.

*Mulla*, in his book principles of Mohammedan Law has defined *mutwalli* as manager of *waqf* properties in the following words:

"*Mutwalli*—Under the Mohammedan Law the moment a *waqf* is created all rights of property pass out of the *waqf* and vest in the Almighty. The *mutwalli* has no right in the property belonging to the *wakf*, the property is not vested in him and he is not a trustee in the technical sense. He is merely a superintendent or manager. The admissions of a *mutwalli* about the nature of the trust are not binding on his successors."

The Supreme Court also had the occasion in *Ahmer G F Arif etc v Commissioner of Wealth-tax* (1) to deal with the rights of a *mutwalli*. It has been said by their Lordships of the Supreme Court in that connection

"The *mutwalli* has no right in the property belonging to the *waqf*. He is not a trustee in the technical sense, his position being merely that of a superintendent or a manager. A *mutwalli* has

(1) AIR, 1971 SC 1691.

no power, without the permission of the court, to mortgage, sell or exchange *waqf* property or any part thereof, unless he is expressly empowered by deed of *waqf* to do so '.

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It is thus clear that a *mutwalli* is not a trustee or manager but a superintendent of property. A *mutwalli* is further not the owner of the property, but merely a servant of God, managing the property for the good of his creatures. The founder of the *waqf* has the power to appoint the first *mutwalli* and to lay down a scheme for the administration of the trust and for succession to the office of *mutwalli*. He may nominate successors by name or indicate any class, together with their qualifications, from whom the *mutwalli* may be appointed and may invest the *mutwalli* with power to nominate a successor after his death or relinquishment of office.

In *Amir Ali's Muhammedan Law*, Vol I, the following passage occurs at p 454

"The *mutwalli* cannot, however, assign or transfer the office to any one, or appoint another during his lifetime, unless his own powers are 'general'

Should he in his lifetime and in health appoint another in his place the appointment will not be lawful and valid, unless the *mutwalli* has obtained the *towliat* with that condition, 'in a general manner'."

*Barthe's Muhammadan Law*, Haneefa at p. 604 reads as follows:

"A superintendent may at death commit his office to another, in the same way as an executor may commit his to another. A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."

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In *Fyabji's Muslim Law* (4th Edition) in para 516 it is stated:

"The *mutwalli* may in accordance with s 514 appoint a successor to succeed him at his death, but he cannot validly transfer his office to another during his lifetime. An appointment or nomination made during the lifetime of the *mutwalli* is revokable like other testamentary dispositions."

*Mulla* in his book *Principles of Mohammedan Law* in para 205 has stated the aforesaid controversy in the following words.

"If the founder and his executor are both dead, and there is no provision in the *wakfnama* for succession to the office, the *mutwalli* for the time being may appoint a successor on his death bed. He cannot, however, do so while he is in health, as distinguished from death-illness. Nor if the office goes by hereditary right."

On the basis of the texts which have been mentioned by us above, it has been argued by *Sri K. C. Saksena* that Mohammedan Law permits appointment of a successor by a *mutwalli* only on his death bed. He contended that these texts definitely contained a prohibition disentitling a *mutwalli* to nominate his successor while he is in good health.

*Sri Bashir Ahmed*, on the other hand, urged that the nomination of a successor can be validly made by a *mutwalli* not only on his death bed but also in good health. He contended that these texts did not contain any prohibition disentitling a *mutwalli* in good health to nominate his successor to succeed in the office of *mutwalli* after his death. He strongly relied upon the observations of *Baillie* (contained in the first sentence) and submitted that nomination of a successor in good health is clearly found permissible by *Baillie*. According

to him, whereas appointment means complete surrender of his office by the *mutwalli*, and the immediate transfer of the same in favour of the appointee, in nomination the surrender of office does not take place immediately on the execution of the document. The office goes to the appointee only after the death of the appointor. In support of this proposition Sri *Bashir Ahmed* relied upon the case of *Haji Abdul Razak v. S Ali Baksh* (1) There, DIN MOHAMMAD, J. observed as follows:

“In my view, however, if appointment means complete surrender of his office by the appointor and its immediate transfer to the appointee, the principle enunciated is quite in accord with Muhammedan Law. But if it is intended to convey that a *mutwalli* for the time being cannot even nominate his successor who is to act as such after his death, with all respect I am disposed to think that the Muhammedan Law on the subject has not been properly appreciated. One can well understand the prohibition against a person who has been deputed to occupy a position of trust in respect of certain property not to divest himself of his responsibility at his own discretion and throw it on the shoulders of another, when he himself is in perfect health and can properly discharge his functions. But why to introduce the same prohibition when he is only to nominate a person who is to take office after his death is altogether incomprehensible. Why, one pauses to think, should a *mutwalli* be permitted to nominate a successor only when his intellect and reason may possibly be impaired, and not when he is in full enjoyment of these faculties.”

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(1) AIR 1946 Lah. 900.

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This judgment of the Lahore Court was challenged by means of an appeal to the Privy Council. Their Lordships of the Privy Council allowed the appeal and reversed the judgment of the Lahore Court on another point, but while dealing with the question of the right of a *mutwalli* to nominate his successor only on death bed, their Lordships made the following observations:

"It certainly is not easy to see any rational basis for a rule which requires that an appointment to take effect on death shall be made only by one in mortal sickness when the appointor's judgment may well be impaired. Moreover, death may come without warning, or the expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective."

It is true that the Privy Council had reversed the decision of the Lahore Court, and it further did not give any concluded opinion on the aforesaid controversial point, but the observation made by it shows that it approved the view of the Lahore Court.

In this connection we may further point out that in *Ahsanullah Shah v Ziauddin* (1) a similar contention was raised before the Privy Council and it was urged that the Mohammedan Law prescribes that a nomination could be valid only if it was made while the incumbent was on his death bed, or was suffering from mortal sickness but not when he was in good health. The Privy Council did not give any final decision on the aforesaid controversy but as observed by the Lahore Court in the case *Haji Abdul Razak v S Ali Baksh* (2) Sir Shadi Lal expressed himself in a manner which would indicate that the Privy Council was not impressed with it at all. The observation made by the Privy Council in this regard is as follows:

(1) 1937 A.L.J. 585.

(2) A.I.R. 1946 Lah. 900 at 914.

"This contention, which appears to be supported by some authorities on the Mohammedan Law would prevent a *mutwalli* from appointing his successor if he died suddenly without any expectation of death, and render ineffective any appointment made by him at a time when he was not on his death bed or suffering from such illness."

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The rule on the basis of which it has been stated that a *mutwalli* cannot appoint his successor excepting on death bed appears to be based on the principle against delegation of the powers of a trustee in favour of another. Although it is true that a *mutwalli* is not a trustee within the meaning of the Act, or as understood either generally or under the Indian Trusts Act, but the nature of the duties which he is required to perform are more or less the same. A *mutwalli* stands in fiduciary relationship and it is against the interest of society in general that such relationship should be allowed to be terminated unilaterally. It thus appears to us that it is on account of this reason that under the Mohammedan Law a *mutwalli* is permitted to appoint his successor on his death bed—so that the *mutwalli* in office may not delegate his power to work as such during his lifetime. Mohammedan Law thus permits the appointment of a successor by a *mutwalli* to be effective after his death. So the appointment of a successor by a *mutwalli* in good health which would be effective after the death of the *mutwalli* does fall within the permissible limits of the Mohammedan law. Taking the view contrary to this, and holding that a *mutwalli* can appoint a successor only when he is in death bed would be irrational. It is not understandable that when an appointment can be made by a *mutwalli* on his death bed why he cannot make a nomination which will be effective after his death. As stated above, the purpose of not transferring the office

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of *mutwalli* during his life time when he is capable to work is achieved both by permitting a *mutwalli* to appoint his successor on his death bed or to make nomination to be effective after his death. It does not appeal to reason that Mohammedan law admitted the power of a *mutwalli* to make appointment to take effect on death only in death bed, as by confining the exercise of that power only to the death bed by a *mutwalli* might result in nullifying the same altogether. As observed by the Privy Council:

“ . . . . Death may come without warning, or expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective.”

We are, therefore, not prepared to hold that the power under the Mohammedan law was given only to make it ineffective, and would thus hold that the nomination of a successor by a *mutwalli* can be made even in good health, to take effect on death.

There is yet another aspect of the matter which has been emphasised by the Lahore High Court in *Haji Abdul Razak v. S. Ali Baksh* (1) in the following words:

“In my view, this insistence on even the nomination to be made on death bed is not in any way supported by Mohammedan law. When the texts lay down that a valid appointment of a successor can only be made on death bed, they deal with the actual transfer of the office at once and not with the nomination of a successor, who is to take office only after the death of the *mutwalli*. Those judgments, therefore, which have interpreted these texts so as to mean that even a nomination to be valid must be made on death bed have, if I may

(1) A I.R. 1946 Lah. 200.



so with all respect, ignored the distinction between appointment and nomination."

We are in complete agreement with the view expressed by the Lahore High Court as in our view as well those judgments which hold that even a nomination to be valid must be made on death bed have ignored the distinction between appointment and nomination. By nomination a *mutwalli* only proposes or selects his successor to exercise his duties as a *mutwalli* on his death. He does not part with or delegate his functions of a *mutwalli* during his lifetime. It is only this delegation or parting with duties by a *mutwalli* during his lifetime in good health that is prohibited.

Mr. *Bashir Ahmad* has relied upon the cases reported in *Niamat Ali v. Ali Raza* (1) and *Mohammed Khan Saheb v. Kadir Betcha Sahib* (2) in support of his contention. The Allahabad case does not appear to have decided the controversy as it arises in the present case. It is true that in the Allahabad case it was observed:

"Assuming that Karamat Ali was legally entitled to be the *mutwalli*, an office which he undoubtedly *de facto* enjoyed, he was entitled to appoint his successor."

But the question as to whether the appointment of a successor could be made by a *mutwalli* only on death bed did not arise for consideration by this Bench.

So far as the Madras case is concerned, it appears that one Amir Khan Saheb, the last man of the family of the original founder, made a settlement by which he endowed the mosque, with some other property, and appointed his foster son as the person entitled to enjoy the property endowed for charity, and to carry out the charity by means of its income. It was this appoint-

(1) A.I.R. 1915 All. 25

(2) A I R. 1926 Mad. 466.

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ment by Amir Khan Saheb which was subsequently challenged. One of the grounds on which the challenge was made that Amir Khan Saheb had no power to appoint him as successor. It was in this connection that the following observations were made by MADHAVAN NAIR, J.:

" . . . . It is a well known principle of Mohammedan law, that in the absence of rules laid down by the founder of the mosque, the *mutwalli* for the time being may validly appoint a successor to himself. The present defendant was so appointed in 1879 and in my opinion he is a validly appointed trustee "

These observations of MADHAVAN NAIR, J. do lend support to the contention of Sri *Bashir Ahmad*. It must, however, be observed that from the facts stated in the judgment it is not clear as to whether the said document was executed on the death bed by Amir Khan Saheb, or not.

Mr. K. C. Saxena has relied upon the following cases:

*Ghazanfar Hussain v Mst. Ahmadi Bibi* (1).

*Ali Asghar v Farid Uddin* (2)

*Haji Sheikh Ali Mohammad v Mohd. Yusuf* (3).

*Mst Kammon v. Allah Baksh* (4)

*Zooleka Bibi v. Syed Zynul Abedin* (5).

*Sheikh Masthan Saheb v Balaram Reddi* (6)

*Khagum Khan v. Mohammad Ali* (7).

*Mazhar Ali Saheb v. Ghulam Murtujah Saheb* (8).

*Azizunnissa v Ghowsan Kasab* (9).

(1) A I R. 1980 All 169

(2) A I R. 1962 Orissa 111

(3) 6 Bom L R 1058

(7) A I R. 1955 A.P. 209

(2) A I R. 1947 All. 261.

(4) A I R. 1941 Lah. 36.

(6) A I R. 1953 Mad. 958.

(8) A I R. 1958 A.P. 8

(9) 63 I C. 136.

Before we deal with the cases relied upon by Sri K. C. Saksena it may be pointed out that in none of the aforesaid cases distinction between 'appointment' and 'nomination' was considered. It was more or less taken for granted in each case that under the Mohammedan law a *mutwalli* could appoint a successor for the time being only on death bed. These authorities, therefore, to our mind, having not considered the question of nomination in good health by a *mutwalli* in the manner in which it was argued before us cannot be said to have decided the same.

In *Ghazanfar Hussain v Mst Ahmadi Bibi* (1) a *wakf* deed dated 7th April, 1922 executed by Mir Inayat Hussain, under which Mst Ahmadi Bibi, defendant no 1, was claiming to be in possession of the property as *mutwalli* of the trust, was challenged by the plaintiff on a number of grounds. The High Court found that Inayat Hussain was the founder of the trust and it was in this connection that the following observations were made:

"Under the Mohammedan Law a *mutwalli* who is not the founder of the trust has no power whilst in health to appoint a successor or to formulate any scheme for succession to the office of the *mutwalli*, but this restriction does not apply to the founder of the *wakf* who in reason and equity ought to have a free hand in the matter of nominating and appointing a *mutawalli* for the administration of the trust *in praesenti*, and in laying down a detailed scheme as regards the succession to the office of the *mutwalli* . . ."

It is thus clear that this Court was only considering the question of the founder of the trust. The right of a founder of a trust to nominate at any stage he

(1) A.I.R., 1980 All. 169.

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liked cannot be doubted. This Court, therefore, was not called upon in the aforesaid case to decide the question as to whether a *mutwalli*, who is not the founder of the trust, was not competent to make nominations in good health

In *Ali Asghar v Farid Uddin* (1), the question which was being considered was as to whether the settler had power to resign his own *mutwalliship* and to appoint another as his successor. It was in connection with this controversy that it was held that on the principles which had been deducted from the texts the *waqif* was himself the first *mutwalli* and he could appoint a successor. The Bench, while dealing with the aforesaid controversy, has simply referred to some of the texts in that connection and, therefore, the said ruling cannot be considered to have pronounced any judgment on the controversy which is being considered by us.

In *Haji Sheikh Ali Mohammad v Mohd Yusuf* (2) it was found that Mukram Ali who had executed the document and appointed *mutwallis* was not in fact a *mutwalli* himself. In view of this finding that Mukram Ali was not a *mutwalli* the observations of the Orissa Court to the effect—

“Under Muhammedan law a *mutwalli* for the time being may appoint a successor on his death bed; he cannot, however, do so while he is in health as distinguished from death-illness”  
 are only *obiter*.

In *Mst Kammon v Allah Baksh* (3), TEK CHAND, J observed—

“It is conceded that under Mohammedan law the nomination of a successor by the *mutwalli* for

(1) A I R 1947 AIL 261.

(2) A.I.R. 1962 Orissa 111.

(3) A I.R. 1941 Lahore 86.

the time being is valid only if it is made while he was in death illness . . . ”

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This case was considered by the subsequent Lahore case reported in *Haji Abdul Razak v. S Ali Baksh* (1) While considering this Lahore case DIN MOHAMMED, J. commented upon the said case in the following words.

“I am disposed to think, with all respect, that the Mohammedan law on the subject has not been properly appreciated ”

Thus it is clear that the Lahore High Court itself did not agree with *Mst Kammon v Allah Baksh* (2)

In *Zoolekha Bibi v Syed Zynul Abedin* (3) the Bombay High Court was not at all concerned with the consideration of the question as to whether a *mutwalli* in good health could nominate his successor It was, considering the difference between *Sajjad-a-nashin* and *mutwalli* Accordingly it can hardly be considered an authority for the proposition in support of the contention advanced by *Sri Saksena*

*Sheikh Masthan Saheb v Balaram Reddi* (4) is a case where the Madras High Court was faced with the problem of the rights of the founder to appoint a *mutwalli* It was in this connection that the Madras Court laid down .

“The Islamic law is clear on the question that when a founder has reserved to himself the power to assume the management of a *waqf* which he creates, on finding that the committee of supervision or other managers or office-bearers have not discharged their duties, he has unfettered rights to assume the management of the trust himself or to appoint another trustee in his discretion for the proper management of the trust . . . .”

(1) AIR 1946 Lah 200

(2) AIR 1941 Lah 36

(3) 6 Bom LR 1058

(4) AIR 1953 Mad 958.

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In *Khagum Khan v Mohd Ali* (1) the question was whether a Jamait or congregation of the worshippers of a mosque have a right to appoint *mutwallis*. In view of the fact that the question for consideration in this case was quite different than the one which is being decided by us, it is futile to expect that any law laid down by the Andhra Pradesh High Court in the said case would be helpful for our purpose in the present case.

From the facts stated in the judgment reported in *Mazhar Ali Saheb v Ghulam Murtaza Saheb* (2), it appears that the question of the competence of a *mutwalli* to nominate his successor did not directly arise for consideration. The main controversy involved in the said case was relating to the succession of *muzavar's* office, as to whether the said office was hereditary or not. The said Court while dealing with this controversy observed that a *mutwalli* in good health cannot appoint his successor. To our mind these observations are merely *obiter* and made when the controversy which arises for our consideration was not in fact up for decision in that case.

The case reported in *Azizunnissa v Chowsan Kasab* (3), definitely supports the contention of Sri *Saksena*, but we respectfully differ from the view taken in the said case. In that case the point had not been considered in the manner it has been raised before us. It is, however, pointed out that in case the learned Judges of that case intended the meaning of the words 'appointment' and 'nomination' to be the same, we find ourselves unable to agree with the same.

After having thus dealt with all the authorities which were cited by learned counsel for either parties, and the texts, we find that Syed Ghulam Abbas could

(1) A I R. 1955 A P 209

(2) A I R, 1958 A P 8,

(3) 68 I.C. 126.

nominate the opposite-parties as *mutwallis* and, therefore, after his death the opposite-parties had rightly come in possession of the properties of the *waqf*.

*Ameer Ali*, in his *Muhammedan Law*, Vol. I, at p 259, observed as follows:

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"In the law relating to *waqf* there are certain primary rules on which the principal doctors are in agreement. With regard to the subsidiary principles there is considerable divergence. The primary rules are, (a) that the subject of the *wakf* should be dedicated in perpetuity; (b) that all human right should be divested therefrom, and (c) that it should be made non-heritable and inalienable. With regard to these there is consensus."

With regard to the subsidiary rules the same learned author has observed at p 258.

"The *kazi* is authorised to construe liberally the legal principles and to apply them in a manner most consistent with justice and expediency."

These observations thus make it clear that there is scope for construing liberally the legal principles which may be applicable to the subsidiary rules relating to Mohammedan *waqf*. In the present case we find that the question of the right of a *mutwalli* to nominate his successor even when he is in good health is a matter to be governed by subsidiary rules. Accordingly, applying the principles of equity, justice and good conscience we would like to hold that Syed Ghulam Abbas was entitled, and was not debarred from nominating his successor by the document while he was in good health.

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It has been observed in *Aziz Bano v Mohammad Ibrahim Hussain* (1), by MUKERJI, J that—

“it is a proposition of Muhammedan jurisprudence that where there are two opinions on a point of Mohammedan law, the court should accept only that opinion which is in consonance with justice, equity and good conscience (See Preface Vol. II, Ameer Ali's Mohammedan Law, p 7).”

SULEIMAN, J also found in that case that it is the duty of the courts in cases of divergent opinion to accept the view which is more in accordance with equity, justice and good conscience

It is not only in cases where there is a divergence of opinion that the principles of equity, justice and good conscience can be applied, but also, according to *Tyabji*, in other cases the aid of these principles can be taken In *Tyabji's Muhammedan Law* (4th Edition) in para 16 it is stated

“In the absence of an express or implied rule of law or custom the court will either follow the analogy of the law in similar instances or decide the matter in accordance with justice, equity and good conscience. That expression is generally interpreted to mean rules of English law if found applicable in Indian society and circumstances.”

Hence having found that the right of a *mutwalli* to make nomination of his successor in good health could be in consonance with justice, equity and good conscience, we hold that Syed Ghulam Abbas had possessed the said right at the time when he nominated the opposite-parties as *mutwallis*.

The question that now arises for consideration is as to whether the Board could still exercise its power



under s 48 and appoint the applicants as *mutwallis* in spite of the fact that opposite-parties were rightly entitled to function as *mutwallis*. S 48 of the Act reads thus

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“48 *Emergency powers of Board when office of mutwalli of waqf vacant*—Without prejudice to the generality of the powers conferred by cl (o) of sub-s (2) of s 10, the Board may, where there is a vacancy in the office of *mutwalli* of a *waqf*—

(a) appoint any person to act as *mutwalli* for such period and on such conditions as it thinks fit, or

(b) by notification in the official *Gazette* assume direct management of the *waqf* for such period not exceeding five years as may be specified in the notification

Provided that in the case of a *waqf* created by a deed, the Board may act under this section only if there is no one competent to be appointed as *mutwalli* under the terms of such deed ”

A reading of the aforesaid section would indicate that there are two requirements of this section before the power under it could be exercised. These requirements are (1) that there should be a vacancy in the office of *mutwalli*, and (2) that the Board may act if no one competent to be appointed as *mutwalli* under the deed was available. In view of our finding that opposite-parties were validly nominated *mutwallis* by Syed Ghulam Abbas there was no vacancy in the office of *mutwalli* in the year 1953 and in the years 1963 and 1969 when the orders under s 48 of the Act were passed by the Board. The Board could not treat the office vacant on the ground that the nomination of the opposite-parties was invalid. Apart from this, we further

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find that in the present case the *waqf* was created by a deed and therefore the Board could act under the section only if no one competent to be appointed as *mutwalli* under the terms of the said deed was available. As according to us the opposite-parties were competent under the deed to function as *mutwallis*, the Board had no power to appoint the applicants under s 48 of the Act.

In view of the finding that the opposite-parties were entitled to function as *mutwallis* it is not necessary for us to express any opinion on the question as to whether these opposite-parties by virtue of being *de facto mutwallis* became *de jure mutwallis*. It is further not necessary for us to decide the question as to whether the Board could exercise the power under s 48 even if the opposite-parties were *de facto mutwallis* and were working in that capacity on the dates the orders were passed.

We thus find that the award of the tribunal holding that the applicants are not entitled to a direction to the opposite-parties to hand over possession of the *waqf* properties to them is correct and it does not need any interference by us.

We, therefore, dismiss the application with costs to opposite-parties 1 to 3.

*Application dismissed.*

## APPELLATE CIVIL (F. B.)

Before Mr Justice K B Asthana, Mr Justice R B.  
Misra and Mr Justice T S Misra

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August, 24

VAISH COLLEGE (SOCIETY),

SHAMLI AND OTHERS

APPELLANTS,

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LAKSHMI NARAIN AND OTHERS . RESPONDENTS

*Agra University Act, 1926, s 25-C(2) and Statute 30, Chap XVIII and Kanpur and Agra, Meerut Universities Act (U P Act No XIII of 1965) s 28(3)—Services of teacher and Principal of affiliated colleges—Not purely contractual but controlled by the above Act and Statutes*

The services of a teacher including the Principal of the affiliated colleges is not purely contractual and is regulated and controlled by the provisions of Meerut Act and Statutes

The management of an affiliated college of the Meerut University is a statutory body or a statutory functionary while discharging its functions under the Act and the Statutes within the meaning of the third exception formulated by the Supreme Court in *S R Tewari's case*

*Kanpur and Agra, Meerut Universities Act, 1965—Management of College—Termination of teacher's services—Acts as a statutory body*

*Held*, that the management of two colleges concerned acts as statutory body or statutory functionary when it takes action to terminate the service of a teacher

—, 1965—*Termination of service of teacher by Management of College—Violation of statutory requirements—Entitled to an injunction or a declaration from Civil Court*

*Held*, that the teacher will be entitled to an appropriate injunction and a declaration from a Civil Court that the action taken against him in terminating his services by the management was in violation of the statutory provision of Meerut University Act and Statutes and that he was entitled to be reinstated in service

*Management Committee of Meerut College, Meerut v Dr Puri* (1) overruled

*Aligarh Muslim University Act, 1921, s 31, Statute 3(2)—Breach of Regulations by any Authority of University—Decision invalid and to be set aside*

(1) 1969 A L J 612.

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The Regulations are meant to be observed and followed and their breach by any Authority of the University in taking a decision will make that decision invalid in the same way as a decision made in breach of the provisions of the Act, the Statutes and the Ordinances

The Regulations have the same force as the provisions of the Act the Statutes and the Ordinances of the Aligarh Muslim University

*Mohd Nafis Khan v Aligarh Muslim University* (1) overruled

Second Appeal No 2973 of 1971 from the judgment and decree dated 3rd December, 1971 passed by S S. Agarwal, 1st Additional Civil and Sessions Judge, Meerut in C A No 148 of 1970

*P C Gupta* and *N P Singh*, for the Appellants

*K C Agarwal* and *A K Yog*, for the Respondents

ASTHANA, J —1 The basic question, common to all these cases referred to a Full Bench, is whether the relationship between the parties was that of pure master and servant unregulated or uncontrolled by any statutory provision and the servant was not entitled to the relief of injunction or declaration of nullity of removal from service and his remedy lay in a suit for damages for breach of contract

*Second Appeal No 2973 of 1971*

2 The first case referred is Second Appeal No 2973 of 1971 which arises out of a suit for permanent injunction to restrain the defendant-appellants from interfering with the plaintiff-respondent in the discharge of his duty as Principal including functioning as such for all intent and purposes of the Vaish Degree College, Shamli, district Muzaffarnagar, later on known as Vyoparik Varg Degree College, Shamli, hereinafter referred to as Vaish College

3. Admittedly Sri Laxmi Narain, the plaintiff-respondent, was the permanent Principal of the Vaish Col-

(1) Sp. App No 95 of 1972 dated 24-1-1972

lege He was appointed as such on 17th May, 1964 His appointment was duly approved by the Vice-Chancellor of Agra University to which the college was then affiliated The plaintiff-respondent joined his post with effect from 1st July, 1964 By a notice dated 24th October, 1966 issued by the Management the plaintiff was directed not to discharge the functions and duties of the Principal of the College and not to obstruct the functioning of Sri K K Kaushik as Acting Principal By a resolution dated 27th October, 1966 Sri K K Kaushik was appointed as the Principal, the Management having held that the plaintiff had abandoned the post On 28th October, 1966 the plaintiff instituted the suit for permanent injunction While the suit was pending the Kanpur, Agra and Meerut Universities Act, 1965 (U P Act XIII of 1965), hereinafter called the Meerut Act, was enforced with effect from 21st November, 1966 and the Vaish College, Shamli, stood affiliated to the Meerut University under the said Act On 12th March, 1967 the Management passed a formal resolution terminating the services of the plaintiff but later on clarified it by a resolution dated 29th March, 1967 terminating the services of the plaintiff as Principal with effect from 24th October, 1966, as from that date according to the Management the plaintiff had absented himself from duty The plaintiff got the plaint amended adding pleas questioning the legality and validity of the action taken by the Management subsequent to the filing of the suit *Inter alia*, the plaintiff alleged that the termination of his services as confirmed Principal being in violation of the provisions of the Meerut Act and the Statutes, was void and in any case the Management not having obtained the approval of the Vice-Chancellor of the Meerut University as required by the Meerut Act, the termination of the services of the plaintiff never took

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effect. The contesting defendants, *inter alia*, set up a plea that the terms and conditions of the service of the plaintiff as Principal were governed by an agreement between him and the Management and were not governed by the provisions of the Act or Statutes of the Agra University or of the Meerut University and the plaintiff was not entitled to the relief of injunction which was barred to him under the Specific Relief Act. It is not necessary to detail out all the other factual allegations of the parties averred in the pleadings as the same are not necessary for the purpose of disposing of this reference.

4 The trial court took the view that as the plaintiff had not been appointed under any written agreement of contract as envisaged by the Statute of the Agra University, he was not entitled to the benefit of the Act and the Statutes and the fact that the resolution terminating the services of the plaintiff was not sent up for approval of the Vice-Chancellor was, therefore, of no avail. On this main finding the suit of the plaintiff was dismissed.

5 The lower appellate court while affirming the finding that the plaintiff was not appointed under any written agreement of contract as required by the Statutes held that that would not disentitle the plaintiff to claim the benefits of the Act and the Statutes of Agra University as in the absence of the written contract the appointment of the plaintiff as Principal was not rendered invalid and as the services of the plaintiff were terminated by the Management without obtaining the approval of the Vice-Chancellor of the Meerut University the order of termination was illegal and void. Then relying upon the decision of the

Division Bench of this Court in *Managing Committee Meerut College v Dr Puri* (1) and of the Supreme Court in *Prabhakar Ram Krishna Jodh v A. L. Pande* (2) the learned Judge held that the statutes framed under the Agia University Act created legal rights in favour of the teachers of the affiliated colleges which could be enforced against the Management of an affiliated college and that the case of the plaintiff fell within the third exception laid down by the Supreme Court in *S R Tewari v District Board, Agia* (3) affirming the principle that the courts are invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute. The appeal was allowed and the plaintiff's suit was decreed for a perpetual injunction restraining the contesting defendants from interfering in his functioning and discharging the duties as Principal of the Vaish College till his services were validly terminated in accordance with the provisions of Meerut Act and the Statutes made thereunder.

6 When the second appeal filed by the contesting defendants was heard by our brother K N SRIVASTAVA, before him on behalf of the appellants reliance was placed on *Executive Committee of State Ware-housing Corporation v Chandia Kiron Tyagi* (4) and *Indian Airlines Corporation v Sukhdeo Rai* (5) in support of the contention that the Division Bench decision of this Court in *Managing Committee of Meerut College, Meerut v Dr V Puri* (1) which supported the view taken by the court below was no longer good law. Brother SRIVASTAVA doubted whether the plaintiff was entitled to the relief of injunction as prayed for and after framing the question "Can the Civil Court grant the relief of injunction in view of the fact and circum-

(1) 1969 A L J 612

(2) 1965 (2) S C R 713

(3) A I R 1964 S C 1680

(4) A I R 1970 S C 1244

(5) A I R 1971 S C 1828

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tances of the present case?", directed that the case be referred to a Full Bench

*Special Appeal No 516 of 1971*

7. The second reference before the Full Bench has come up in Special Appeal No 516 of 1971, the Board of Management of Dayanand Brijendra Swarup College, Dehra Dun v Suresh Chandra Varma arising out of original Writ No 4035 of 1968. The Division Bench while admitting the special appeal passed an order directing the appeal to be heard by a Full Bench.

8. Suresh Chandra Varma, the petitioner, was a Geography teacher in Dayanand Brijendra Swarup Degree College, Dehra Dun, hereinafter referred to as Dayanand College. He entered in service as a probationer in 1963 and was confirmed in that post in 1965. On 7th June, 1967 the petitioner was suspended and was served with certain charges. The petitioner submitted an explanation. Meanwhile the petitioner was found to have committed some other misconduct and a consolidated charge-sheet dated 31st October, 1967 was served upon him. The petitioner submitted his reply on 15th November, 1967. The Management Committee of the Dayanand College appointed a Sub-Committee which submitted its report on 16th June, 1968. On the basis of the said report the Committee of Management passed a resolution terminating the services of the petitioner. This resolution was approved by the Vice-Chancellor and finally an order terminating the services of the petitioner was passed on 21st August, 1968.

9. The petitioner questioned the validity and legality of the termination of his service on the main ground that the Committee of Management of the College contravened Statute 30 of Chap XVIII of the Agra University Statutes applicable to the Meerut University to



which the college was affiliated. The learned single Judge who heard the petitioner on merits relying on the *Managing Committee, Meerut College v. Dr. V. Puri* (1) repelled the contention of the respondents that the resolution passed by the Committee of Management even if wrongful and illegal, could not be questioned in a writ petition as the relationship between the petitioner and the college was governed by a contract of service and the remedy of the petitioner lay in damages for breach of contract. The learned Judge holding that the petitioner was not afforded adequate and reasonable opportunity as required by Statute 30, allowed the writ petition and quashed the resolution of the Committee of Management dated 16th June, 1968 and the order dated 21st August, 1968 terminating the service of the petitioner. On appeal by the Committee of Management, the Special Appeal Bench directed the special appeal to be referred to a Full Bench in view of the doubt as to the correctness of the Division Bench decision in *Dr. Puri's* case (1).

*Writ Petition No. 858 of 1970*

10 The third case referred is a Writ Petition No. 858 of 1970 Ahmad Husain v Aligarh Muslim University. The petitioner is a Head Clerk employed in the office of the Registrar of the Aligarh Muslim University. He was appointed as Assistant Registrar on probation. His probation was extended from time to time. By its resolution dated 13th February, 1970 the Executive Council of the University decided not to confirm the petitioner in the post of Assistant Registrar and directed him to be reverted to his substantive post of Head Clerk. The petitioner challenged the legality and validity of this resolution of the Executive Council on the ground that the resolution was in the breach of the

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(1) 1969 A L J 612.

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relevant Regulations framed by the Executive Council of the University in exercise of its powers under s 31 of the Aligarh Muslim University Act. On behalf of the respondent University it was contended that the reversion of the petitioner to his substantive post was not in the breach of any Regulation and in the alternative it was contended that the Regulations framed by the Executive Council of the University in exercise of its powers under s 31 of the Aligarh Muslim University Act have no statutory force and assuming the same were violated, it would not entitle the petitioner to a relief under Art 226 of the Constitution. Brother G C MATHUR, who heard the petition, referred the following question to the Full Bench

“Whether a writ petition is maintainable by an employee of an University which is a statutory body on the ground that his services have been terminated or he had been reduced in rank in violation of the provisions of the Regulations framed by the University?”

11 The fourth case listed before us is Writ Petition No 68 of 1971, Ramesh Chandra Bhudwar v Vice-Chancellor, Meerut University. Sri L M Pant, learned counsel for the petitioner stated that this case has been listed before the Full Bench only formally to enable him to address legal arguments if necessary, as in this case also similar questions which arise in the cases referred are involved. Sri Pant and Sri Bhatnagar appearing for opposite-party specifically stated that the parties do not desire the Full Bench to consider the case with a view to express their opinion on the question involved. It is, therefore, not necessary to state the facts and the points arising in the fourth case.

12 From the above narration of the salient facts of the three cases referred, it is clear that the relationship between the contesting parties is that of master and servant. Involved in each case is a relief in some form or shape of reinstatement of the servant in his post of employment on the ground that the termination of his employment by the master was null and void. It is well settled that a contract of personal service cannot be specifically enforced. A declaration by a court that the termination has no effect and the servant still continues in service and directing that he be reinstated ordinarily cannot be made as that will amount to enforcing a contract of personal service. This principle of law was accepted by the Supreme Court in *Dr S Dutta v University of Delhi* (1). In the same case the Supreme Court noticed a decision of the Privy Council in the case of *High Commissioner for India v I M Lall* (2) wherein the Judicial Committee accepted the principle that where a suit of the servant is founded on the claim that his dismissal by the master was void and of no effect as certain mandatory provisions of the law had not been complied, a declaration that the purported dismissal was void and inoperative and he remained in service will not amount to enforcing a contract of personal service. A declaration of a statutory invalidity of an act of the master is a thing entirely different from enforcing a contract of personal service. The principle of law that emerges from the decision of the Supreme Court in *Dr S Dutta's* case (1) is that since the law prohibits the specific performance of a contract of personal service any wrongful termination of the service of the employee by his employer would not entitle the employee to a declaration that his status remained unaffected, he still continued in

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(1) AIR 1968 SC 1050

(2) AIR 1948 PC 121

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service and he be reinstated to his post of employment. But where the employee bases his claim on the breach of some statutory provision which governed and regulated the conditions of his service he will be entitled to a declaration that his status remains unaffected, he still continues in service and he be reinstated as in doing so the court of law does not enforce a contract of personal service but the court declares that the act of removal from service was statutorily invalid.

13 The problem with which we are faced in the cases before us is whether the employees concerned have founded their claim on the basis of the act of termination of their service by their respective employer in breach of some statutory provision and they can ask the court to make a declaration of a statutory invalidity. In the first two cases referred, that is of the Principal of the Vaish College and the teacher of Dayanand College, a claim has been made that the termination of their respective services by the Management of the colleges concerned was in violation of the provisions of the Acts and the Statutes applicable to the University to which the colleges were affiliated. On the relevant dates when the termination orders were passed by the Management of the respective colleges they stood affiliated to the Meerut University. In the case of *Managing Committee of Meerut College, Meerut v Dr V Puri* (1) a Division Bench of this Court finding that the termination of the service of Dr Puri was in derogation of the relevant Statutes declared the resolution and the order terminating the service of the petitioner as illegal. The Division Bench repelled the contention of the Management of the college that no declaration could be given as a servant cannot be forced on a master.

(1) 1969 A L J 612.

and there can be no specific performance of a contract relating to personal service with the following observations.

'It has been contended that a servant cannot be forced on a master and that there can be no specific performance of a contract relating to personal service. In our opinion this principle does not apply in the present case because we have already said that the matter is not purely contractual and in terminating the services of Dr Puri, the Management of the Meerut College has breached statutory provisions''

14. It is not disputed by Sri S N Kacker appearing for the Management of the Vaish College and Sri Jagdish Swarup appearing for the Management of the Dayanand College that the provisions of the Act and the Statutes which applied to the Meerut College in the case of *Dr Puri* (1) governed the conditions of affiliation of the respective colleges also whom they represent and the Division Bench decision in *Dr Puri's* case (1) would have been conclusive against them had it been good law. The learned counsel for the Management of the colleges submitted that in view of the declaration of law made by the Supreme Court subsequent to the decision in *Dr Puri's* case (1) the decision of the Division Bench in that case will be deemed to have been overruled and no longer good law. In this connection a reference was made to *Executive Committee of U P. State Warehousing Corporation Lucknow v Chandra Kiran Tyagi* (2), *Indian Airlines Corporation v Sukhdeo Rai* (3), *Bank of Baroda Ltd. v Jewan Lal Mehrotra* (4) and *Vidya Ram Misra v The Managing Committee* (5). The argument was that the

(1) 1969 A L J 612;

(3) A I R 1971 S C 1828

(2) A I R 1970 S C 1244

(4) 1970 (20) F L R 339

(5) A I R 1972 S C 1450

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relationship between the teacher and the Management of the colleges, a private body, being purely contractual, assuming that the termination of service of the teacher by the Management was wrongful, the teacher was not entitled to declaration and reinstatement in his post of employment and his remedy lay in an action for damages for breach of contract. The argument so raised involves consideration of the following propositions.

1. Whether the service of a teacher including the Principal of the affiliated colleges in question is purely contractual, unregulated and uncontrolled by any provision having the force of law?
2. Whether the Management of the two colleges concerned acted as a statutory body or statutory functionary when it took action to terminate the service of the teacher?
3. Whether the Committee of Management of the affiliated colleges when found to be bound to follow a procedure prescribed by law or bound to comply with some statutory requirement before the termination of the service could be effective, any termination of service of a teacher by it in violation of such statutory requirements will entitle the teacher to an injunction or a declaration of statutory invalidity of the action taken?
15. It would be appropriate at this stage to examine the relevant Acts and Statutes which govern the affiliation of the colleges in the Meerut University. The Kanpur and Meerut Universities Act, 1965 (U. P. Act XIII of 1965), came into force with effect from 21st November, 1966. By sub-s. (3) of s 4 of the Meerut Act all the colleges situate within the area of Meerut University which at the commencement of the Meerut Act were affiliated to the Agra University

under the Agra University Act, 1926 (hereinafter referred to as the Agra Act) from such date as the State Government may by notification in the Gazette appoint in this behalf would be deemed to be affiliated to the Meerut University. It is the common case of the parties that the Vaish College and Dayanand College are situate in the area of the Meerut University under the Meerut Act and before the commencement of the Meerut Act they were affiliated to the Agra University under the Agra Act and that the requisite notification was issued by the State Government under sub-s (3) of s 4 of the Meerut Act and they became affiliated to the Meerut University. Though the Meerut Act envisaged by its s 31 that the First Statute shall be made by the State Government but it appears that no such statute were made when the Meerut Act commenced. The Meerut Act by its s 50 (1) (aa) enacts that the State Government may for the purposes of removing any difficulty in relation to the enforcement of the Act by order published in the Gazette direct that all or any of the Statutes or Ordinances made under the Agra University Act 1926 shall with such adaptations and modifications whether by way of addition amendment or omission as it may deem to be necessary or expedient, apply in relation to the University for so long as the First Statutes in respect of the same subject-matter are not made under sub-s (1) of s 31. The State Government issued a notification dated 18th November, 1966, by publication in the U P Government Extraordinary Gazette dated 21st November 1966 in exercise of its powers under cl (aa) of sub-s (1) of s 50 of the Meerut Act directing that the Statutes and Ordinances of the Agra University as amended up-to-date shall apply to the Meerut University for so long as the First Statutes in respect of the same subject-matter were not made under sub-s (1) of s 31. *Inter alia* by the,

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said notification the Statutes relating to affiliation and recognition of colleges contained in Chap XVIII of the Agra University Handbook, 1965-66 were applied

16 It is further the common case of the parties that at the relevant time when the impugned action was taken by the Management of the respective colleges Statutes contained in Chap XVII of the Agra University relating to affiliation and recognition of colleges applied It is further the common case of the parties that when Sri Laxmi Narain was appointed the Principal of the Vaish College and Sri Suresh Chandra was appointed teacher in the Dayanand College, those colleges stood affiliated to the Agra University and the provisions of the Agra Act and the Statutes framed thereunder were applicable

17 S 25-C of the Agra Act by its sub-s (1) enacts that every teacher in a affiliated college shall be appointed under a written contract which will contain such terms and conditions as may be laid down by the Statutes Sub-s (2) enacts that every decision by the Management of an affiliated college to dismiss or remove from service a teacher shall be reported forthwith to the Vice-Chancellor and subject to provisions to be made by the Statutes shall not take effect until it has been approved by the Vice-Chancellor "Teacher" as defined in sub-s (2) (f) in the Agra Act means a teacher of the University or teacher of an affiliated college and includes a Principal It is not disputed that the provisions of s 25-C of the Agra Act also applied in the case of a Principal of an affiliated college of Agra University In the Meerut Act also there are parallel provisions as contained in s 25-C of the Agra Act Sub-s (1) of s 28 of the Meerut Act enacts that every teacher in an affiliated college shall be appointed under a written contract which shall contain such terms and con-



ditions as may be prescribed Sub-s (3) enacts that every decision by the Management of an affiliated college to dismiss or remove from service a teacher shall be reported forthwith to the Vice-Chancellor and, subject to the provisions contained in the Statutes shall not take effect unless has been approved by the Vice-Chancellor Here at this stage it is proper to note that in 1964 when Sri Laxmi Narain was appointed permanent Principal of the Vaish College and his appointment was approved by the Vice-Chancellor of the Agra University as found by the courts below, no written contract as contemplated by sub-s (1) of s 25-C of the Agra Act was executed but before us the learned counsel for the parties proceeded on the basis that his appointment was in order as if he was appointed under a written contract It is further important to note that the Vice-Chancellor of Meerut University has not yet approved the decision taken by the Management of the Vaish College terminating the services of Sri Laxmi Narain as Principal In the case of Sri Suresh Chandra, the Geography teacher of Dayanand College who duly executed a written contract, the Vice-Chancellor of Meerut University had approved the decision of the Management of the college terminating his services

18 Reverting to the relevant Statutes relating to affiliation and recognition of colleges contained in Chap XVIII of the Agra University Statutes which admittedly applied in the two cases out of three before us, it will be found that conditions of service of teachers of affiliated colleges are contained in Statutes starting from Statute 28 and ending with Statute 42 Statute 29-A provides that the Principals and all other members of staff of the colleges shall be appointed on a definite written contract of service which shall embody the specified points mentioned therein and shall be in the form appended at the end of the Chapter Eight

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points are enumerated Cl 4 deals with the grounds on which services can be terminated and mentions ·

(a) wilful neglect of duty,

(b) misconduct including disobedience of the orders of the Principal,

(c) breach of any of the terms of contract;

(d) physical or mental unfitness,

(e) incompetence provided that the plea of incompetence shall not be used against a teacher after two years of confirmation, and

(f) abolition of the post with the prior approval of the Vice-Chancellor,

and says that they shall be the only grounds on which services can be terminated Cl 5 provides for three months' notice on either side for terminating the contract or in lieu of such notice the payment of three months' salary except when termination of service takes place under sub-cl 4 (a), (b), or (c) of cl 4 It would be noticed that the points which are required to be embodied in the written contract as mentioned in Statute 29-A do not mention the procedure to be adopted for terminating the services of the teacher on the grounds enumerated in cl 4 Such a provision is made by Statute 30, the material portions of which may now be quoted ·

“30 Every decision by the Management of an affiliated college, other than a college maintained by Government, to dismiss or remove from service a teacher shall be subject to the provisions of this Statute

(1) No order dismissing or removing from service a teacher shall be passed unless charge has been framed against the teacher and communicated to him/her with a statement of the grounds on which it is proposed to take action, and he/she has been given adequate opportunity—

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(i) of submitting a written statement of his/her defence,

(ii) of being heard in person, if he/she so chooses, and

(iii) of calling and examining such witnesses in his/her defence as he/she may wish, provided that the Committee of officer authorised by the Managing Committee to conduct the enquiry may, for sufficient reasons to be recorded in writing refuse to call any witness

(2) The Committee of Management may at any time, not exceeding two months from the date of the receipt of the teacher's explanation in respect of the charge or charges communicated to him/her, at a meeting convened under its rules, pass a resolution dismissing or removing from service a teacher for any one or more of the following grounds.

(i) Wilful neglect of duty,

(ii) misconduct, including disobedience to the order of the Principal in the case of the teachers;

(iii) breach of any of the terms of contract;  
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(iv) incompetence, provided that the plea of incompetence shall not be used against a teacher after two years of confirmation

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(3) The teacher may at any time within fifteen days after the passing of such a resolution which shall contain the grounds of dismissal or removal, as the case may be, and which shall be communicated to him/her forthwith, apply to have the decision of the Committee of Management reviewed by it at a subsequent meeting, and the Committee shall on receipt of such an application be summoned to a second meeting within one month of the receipt of such an application. At such a meeting the teacher may submit an additional statement of his/her case and shall, if he/she so desires, be allowed to appear before the Committee in person to state his/her case and to answer any question that may be put to him/her by any member present at the meeting. If the teacher does not apply to have the resolution of the Committee reviewed, or if the resolution is confirmed by the Committee at subsequent meeting by a two-thirds majority of the members present, further notice of dismissal or removal from service need not be given to the teacher but he/she shall be given a copy of the resolution passed at such a meeting.

(4) The Committee of Management may, instead of dismissing or removing from service the teacher, pass a resolution inflicting a lesser punishment by reducing the pay of the teacher for specified period or by stopping increments of his/her salary for a specified period and/or may deprive the teacher of his/her pay during the period, if any, of his/her suspension. The teacher in such a case also shall be entitled to apply to have the resolution of the Committee reviewed as provided above, and if he/she is not satisfied with the deci-

sion of the Committee, he/she may appeal to the Vice-Chancellor for reconsideration of his/her case and the decision of the Vice-Chancellor shall be final. The resolution of the Committee punishing the teacher shall operate only when and to the extent approved by the Vice-Chancellor.

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(10) Every decision of the Management about the dismissal or removal from service of a teacher shall be reported forthwith, along with a complete report and all connected papers, to the Vice-Chancellor who shall consider whether the provisions of the above Statutes have been complied with. If he is satisfied that the provisions of the Statute have not been complied with or that the grounds on which the teacher has been dismissed or removed from service are not adequate, he will disapprove of the decision of the Managing Committee. The decision of the Vice-Chancellor shall be communicated to the Management within six weeks of the receipt of the proposal for compliance. If, however, the Vice-Chancellor feels that any particular point needs clarification, he may call upon the Committee of the Management and the teacher concerned to give the necessary clarification before giving his decision. The decision of the Managing Committee will operate only if and when approved by the Vice-Chancellor."

19 Sri S N Kacher and Sri Jagdish Swarup on behalf of the Management of the respective colleges submitted that sub-s (2) of s 25-C of the Agra Act and the parallel provision contained in sub-s (3) of s 28 of the Meerut Act and the Statute 30 of Chap XVIII of Statutes of Agra University, by themselves do not have the force of law so as to regulate the relationship, bet-

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ween the management and the teacher and do not confer upon the teacher any enforceable legal right until and unless they are incorporated in the terms of written contract between the teacher and the Management as envisaged by sub-s (1) of s 25-C of the Agra Act or sub-s. (1) of s 28 of the Meerut Act. It was their submission that those provisions being a part of the written contract any breach thereof by the Management would amount merely to a breach of contract and not to the breach of any statutory duty imposed by law. To put in different words breach of the said provisions by the Management will not amount to a breach of law making the action null and void entitling a teacher to a declaration or injunction. Reliance was placed mainly on a decision of the Supreme Court in the case of *Vidyalam Misra v S N J College* (1) in support of the submission that the provisions of Statute 30 and sub-s. (2) of s 25-C of the Agra Act or the parallel provisions of Meerut Act have *proprio vigore* no force of law, the relationship between the parties being purely contractual and the Management of the college not being a statutory body, the case of the teacher did not fall in any of the exceptions laid down by the Supreme Court in the case of *S. R Tewari v. District Board of Agra* (2).

20. Sri *Shanti Bhushan* appearing for Laxmi Narain, Principal of Vaish College and Sri *Raja Ram Agarwal*, appearing for Suresh Chandra, the teacher of Dayanand College, contended in reply that in accordance with the law declared by the Supreme Court in the case of *Prabhakar Jodh v S A. L Pandey* (3) despite the teacher of the affiliated college of the Meerut University having been appointed under a written con-

(1) AIR 1972 SC 1450

(3) 1965 (2) SCR 718,

(2) AIR 1964 SC 1680.

tract the provisions of Statute 30 and of sub-s (2) of s 25-C of the Agra Act or sub-s (3) of s 28 of the Meerut Act will have the force of law and the relationship between the parties cannot be said to be purely contractual, the conditions of service being governed and regulated by law and the teacher would be entitled to a declaration or injunction as the Management constituted by the University Acts and the Statutes made thereunder functioning as a Statutory body in terminating the services of the Principal or the teacher violated those provisions thus the teacher's claim being based on breach of the Statute, the order of termination was liable to be declared null and void and the case squarely fell within the third exception formulated by the Supreme Court in *S. R. Tewari's case* (1)

21 *Sri Shanti Bhushan* advanced a further argument on behalf of *Laxmi Narain*, Principal of *Vaish College*, based on sub-s (2) of s 25-C of the Agra Act and the parallel provisions contained in sub-s (3) of s 28 of the Meerut Act. He contended that the rule enacted in the said provisions was not a condition of service but a limitation imposed on the power of Management binding on it. therefore, the Vice-Chancellor not having approved of the action taken by the Management, the termination never became effective, at any rate is not yet effective and the Principal was entitled to an injunction or a declaration to that effect. *Sri Kacker* for the Management refuted this contention, without prejudice to his main argument mentioned above and submitted that even without the approval of the Vice-Chancellor the termination of the service by the Management factually brought to an end the relationship of master and servant between the parties and at worst it will be a wrongful act on the part of the Management and not a breach

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of law as the failure on the part of the Management to perform its duty to send for approval its resolution of termination to the Vice-Chancellor would not give any enforceable right to the Principal and will only result in disaffiliation of the college at the discretion of the University. Learned counsel said that mere absence of approval by the Vice-Chancellor will not make the actual termination of service *non est* as there was a *de facto* end of the relationship of master and servant when the Management passed the resolution terminating the service of the Principal and since then he was excluded from his office and did not do any work for the college as Principal. Two cases were cited in this connection—*S N Awasthi v President, K A Degree College* (1) and *Francis v. Municipal Councillors* (2).

22 In *Awasthi's* case (1) the High Court considered the effect of cl (d) of the First Statute 606 of the Kanpur University. It reads as follows:

“The Management may, before or at the end of the period of probation (including the extended period, if any), terminate the services of a teacher of the College if his work or conduct is not considered satisfactory.

Provided that prior permission of the Vice-Chancellor shall be necessary.”

The probationary service of *Awasthi*, a teacher in the K A Degree College affiliated to Kanpur University were terminated by the Management of the College without obtaining the prior permission of the Vice-Chancellor of the Kanpur University. It was held that the resolution of the Managing Committee in effect terminated the services of the teacher and the termination being without prior permission of the Vice-Chancellor the resolution made in contravention of

(1) 1971 A.L.J. 1105

(2) 1982 (3) All. E. R. 688.



the Statutes 606 (d) was invalid. It was submitted by Sri Kacker that though the prior permission of the Vice-Cancellor was necessary under the Statute yet it was held that the resolution of the Management effectively terminated the services. It is difficult to appreciate how the decision in *Awasthi's* case (1) supports the proposition, as the High Court struck down the resolution holding it invalid. In fact the observations in para 7 of the reported judgment at p 1109 relied upon by Sri Kacker were made to repel an argument on behalf of the Management that there was automatic cessation of the services of the teacher as his probation which was for two years was never extended and the so-called resolution was of no consequence.

23 In the case of *Francis v Municipal Councillors* (2) the Privy Council considered s 16(5) of an Ordinance empowering the President of the Municipal Council to remove persons from office appointed on a commencing salary of dollars 200 a month subject to the approval of the Councillors. There is nothing in the decision of the Privy Council in the case cited which may be of any assistance to Sri Kacker as the decision turned on the finding that Francis was not removed from service by the President and was entitled to damages as his services were actually put to an end by the Councillors who were the employers by confirming the decision of the Establishment Committee who terminated the service of Francis. Sri Kacker attempted to draw assistance from the decision of the Privy Council in *Francis's* case (2) on the ground that though termination of service was not in accordance with the law yet the termination was held effective as the Councillors who were the employers by confirming the decision of Establishment Committee, a body not authorised to

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(2) 1962 (3) All E R 633.

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terminate the service, put an end to the relationship of master and servant. The submission was that the Management of the Vaish College being the employer passed a resolution terminating the service of the employee and no matter the requirement of the law was that the termination should receive the approval of the Vice-Chancellor, it would still be effective and if found wrongful would only entitle the Principal to claim damages.

24 Sub-s (2) of s 25-C of the Agra Act and the parallel provision in sub-s (3) of s 28 of the Meerut Act lay down that a decision by the Management of an affiliated college to dismiss or remove from service a teacher shall not take effect until it has been approved by the Vice-Chancellor. In the cases cited by Sri Kacker the courts had no occasion to consider any such provision of law. That a decision would be subject to the approval of some person or authority is not the same thing as saying that a decision shall not take effect until it has been approved by some person or authority. It cannot be doubted, assuming the abovesaid provisions of the Agra Act and the Meerut Act have force of law and apply independent of the written contract, the dismissal or removal from service of a teacher by the Management of an affiliated college will not take effect until the happening of an event indicated in the said provisions, that is, the approval by the Vice-Chancellor. The question whether these provisions by themselves do not regulate the terms and conditions of service of a teacher of affiliated college and acquire vitality and force only when they become a part of service contract is yet to be determined.

25 It was also suggested by the learned counsel for the Management of the colleges that the relationship between the Management and its teachers being

wholly contractual the teachers did not enjoy any status as being occupant of any public office or the holder of any public office protected by any provision of law. This argument was refuted by the learned counsel appearing for the teachers on the submission that under the scheme of the University Acts and the Statutes the teachers and the Principals are holders of office of status as such, as the provisions of this law protect their office and give them security of tenure

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26 The important question then arises for consideration is whether such terms and conditions of service of the teacher of an affiliated college as find mention in Statute 30 or s. 25-C(2) of Agra Act or s. 28(3) of the Meerut Act have *proprio vigore* force of law. For the teachers, as said above, it was contended that to the nature and character of their employment under the scheme of the Act and the Statute applicable the ratio of *Jodh's* case (1) decided by the Supreme Court fully applied while on behalf of the Management it was contended that the ratio of *Vidyaram Misra's* case (2) applied. The learned counsel for the Management even went to the extent of submitting that the decision of the Supreme Court in *Vidyaram Misra's* case (2) will be deemed to have overruled their earlier decision in *Jodh's* case (1), a proposition which is very difficult to accept. In *Vidyaram Misra's* case (2) the learned Judges of the Supreme Court noticed their previous decision in *Jodh's* case (1) and distinguished it but did not even remotely hint that *Jodh's* case (1) was not correctly decided. It is not possible, therefore, to hold that the decision in *Jodh's* case (1) stands overruled and the law declared therein is no longer good law and binding. Rather a perusal of the

(1) 1965 (2) S C R. 718

(2) A I R 1972 S C 1450

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judgment of the Supreme Court in *Vidyaram Misra's* case (1) clearly shows that the principle of law as formulated in *Jodh's* case (2) was not disapproved but it was not found applicable to the facts in *Vidyaram Misra's* case (1) as the scheme under the Lucknow University Act and the Statutes applicable to the Associate Colleges of Lucknow University was found to be different in comparison to the scheme under the University of Saugar Act and the Ordinances made thereunder. In *Jodh's* case (2) it was held by the Supreme Court that cl 8(vi) (a) of the College Code (Ordinance 20) framed by the University requiring the Governing Body of the College not to terminate the service of any teacher confirmed in the service of the college without following the procedure mentioned therein despite the fact that the teachers of the colleges were duly appointed on a written contract, conferred a legal right on the teachers of the affiliated colleges. The argument that the College Code merely regulated the legal relationship between the affiliated colleges and the University and it imposed only contractual terms and conditions of service was repelled. In *Vidyaram Misra's* case (1) the Supreme Court found that on a plain reading of Statute 151 of Lucknow University it was manifest that all the terms and conditions of service of a teacher must be incorporated in the contract to be entered into between the college and the teacher concerned and did not say that the terms and conditions have any legal force without being embodied in an agreement, therefore, without the contract they had no vitality or conferred any legal right. The learned Judges emphasised more than once in the course of their judgment that Statutes did not specify any procedure for removal of a teacher independently of the contract and the terms

(1) A.L.R. 1972 S.C. 1450.

(2) 1965 (2) S.C.R. 713

and conditions mentioned in Statute 151 had no efficacy unless they were incorporated in a contract. Thus two principles of law emerge from the decisions of the Supreme Court in *Jodh's* case (1) and *Vidyaram Misra's* case (2). Where any provisions of an Act, Statute or Ordinance relating to the conditions of affiliation of colleges to a University on their own force, that is, *proprio vigore* are enforceable, no matter the teacher of the affiliated college is required to be appointed under a written contract he will have an enforceable right entitling him to declaration of statutory invalidity of any action taken against him in violation of such provisions affecting his employment, and (2) where the University Act, Statutes or Ordinances relating to affiliation of colleges to a University require certain specified terms and conditions to be incorporated in a written contract to be entered into between the Management of the affiliated college and its teacher at the time of appointment, and nothing else remains affecting the conditions of service which is not wholly governed by the contract, then anything done by the Management of the affiliated college adversely affecting the teacher in respect of his employment would amount only to a breach of contract actionable in damages.

27. The problem, therefore, in the cases before us reduces to this: whether sub-s (1) of s. 25-C and the relevant Statutes contained in Chap XVIII of the Statutes of Agra University relating to the terms and conditions of affiliation require the provisions of Statute 30 and the provisions of sub-s. (2) of s. 25-C of the Agra Act to be incorporated in the written contract? Do they indicate that the same would not have any legal force unless a written contract containing such terms and conditions was executed? That

(1) 1965 (2) S.C.R. 713  
8 HC (ILR)—1973—8

(2) AIR 1973 SC 1450

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is to say, whether Statute 30 and sub-s. (2) of s. 25-C of the Agra Act have the same character as cl 8 (vi) (a) of the College Code framed under the University of Saugar Act conferring an enforceable legal right on the teacher or are they merely in the nature of terms and conditions required to be incorporated in the written contract ?

28. Before examining the above propositions an argument raised on behalf of the Management to the effect that the Statutes or Ordinances framed under the Meerut Act in regard to conditions for affiliation of colleges operate only in the field of relationship of the affiliated college with the University and any breach thereof by the Management of the affiliated college will only visit the affiliated college with the penalty of disaffiliation at the discretion of the University and will not give any right to a teacher which could be enforced before a court of law though such breach by the affiliated college affects the teacher prejudicially, has to be considered. In *Jodh's* case (1) the Supreme Court does not appear to have accepted the argument so widely as stated above. The learned Judges observed:

"It is not disputed on behalf of the respondents that the 'College Code' has been made by the University in exercise of its statutory power conferred by s 32 and under s 6(6) of the Act. It is also conceded on behalf of the respondents that the College Code is not *ultra vires* of the powers of the University contained in s 32 and s. 6(6) of the Act. In our opinion, the provisions of Ordinance 20, otherwise called the College Code, have the force of law But confers legal rights on the teachers of affiliated colleges and it is not the correct proposition to say that the College Code

(1) 1965 (2) S C R. 713.

merely regulates the legal relationship between the affiliated colleges and the University alone. We do not agree with the High Court that the provisions of the College Code constitute power of Management. On the contrary we are of the view that the provisions of College Code relating to the pay scale of teachers and their security of tenure properly fall within the statutory power of affiliation granted to the University under the Act. It is true that cl 7 of the Ordinance provides that all teachers of affiliated colleges shall be appointed on a written contract in the form prescribed Sd. A, but that does not mean that teachers have merely a contractual remedy against the governing body of the college. On the other hand, we are of opinion that the provisions of cl. 8 of the Ordinance relating to security of the tenure of teachers are part and parcel of the teacher's service conditions and, as we have already pointed out, the provisions of the College Code in this regard are validly made by the University in exercise of the statutory power and have, therefore, the force and effect of law. It follows, therefore, that the College Code creates legal rights in favour of teachers of affiliated colleges and the view taken by the High Court is erroneous."

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29 From what is quoted above it is manifest that the Supreme Court took the view that as Ordinance 20 was made by the University in exercise of the statutory power laying down the terms and conditions of services of the teachers relating to their pay and scale and security of tenure properly fell within the statutory power of affiliation granted to the University under the Act and, therefore, they had the force and effect of law. The Supreme Court deliberately rejected the proposition that Ordinance 20 merely regulated the legal

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relationship between the affiliated colleges and the University alone. They further did not agree with the High Court that the provisions of Ordinance 20 constituted power of management. They also repelled the contention that as cl 7 of the Ordinance provided that all teachers of affiliated colleges shall be appointed on a written contract in the form prescribed for the teachers had merely a contractual remedy against the governing body of the college

30. Then relying upon the decisions of the Supreme Court in *Ware Housing Corporation v. Tyagi* (1) and *Indian Airlines Corporation v. Sukhdeo Rai* (2), it was argued by the learned counsel for the Management of the Colleges that though the statutes were framed under the Agra Act laying down the terms and conditions of relationship between the affiliated college and its teachers any order made in breach of such statutes would not amount to breach of any statutory obligation entitling the teacher to a declaration and at worst the resolution of termination passed by the Management of the College would only be a breach of contract making the management liable for damages. It is important to note that in the two cases, *Warehousing Corporation* (1) and *Indian Airlines* (2) the Supreme Court held that the relevant regulations framed by the Corporations had no statutory force. Since *Jodh's* case (3) was not noticed in these cases, it cannot be said that the declaration of law in *Jodh's* case (3) is no longer good and binding. In the cases before us the teachers stand on a stronger footing. The Statutes under Chap. XVIII of the Agra University Statutes which are applicable were not framed by the Meerut University. The Meerut Act by its s. 50(1)(aa) enforc-

(1) A.I.R. 1970 S.C. 1244

(2) A.I.R. 1971 S.C. 1828.

(3) 1965 (2) S.C.R. 718.



ed it In fact these Statutes were substituted for the First Statutes of the University which up to that time had not been framed It is not disputed on behalf of the Management that the First Statutes will always be a part of the Act and enforceable as such. It is difficult then to agree with the contention that the Statutes under Chap XVIII of the Agra University Statutes will not have the same force as the provisions of the Act. Statutes under Chap. XVIII, therefore, bear no resemblance to the regulations made by the Warehousing Corporation or the Indian Airlines Corporation.

31 To surmount the above formidable difficulty Sri Kacker for the Management of the Vaish College went so far as to submit that the provisions of s 50(1) (aa) of the Meerut Act were *ultra vires* as they suffered from the vice of excessive delegation of legislative power to the Executive There is hardly any tenability in this contention. What was provided by cl. (aa) of sub-s (1) of s 50 of the Meerut Act was that the State Government may, for the purposes of removing any difficulty in relation to enforcement of the Act direct that all or any of the Statutes or Ordinances made under the Agra University Act, 1926 shall with such adaptation and modifications whether by way of addition, amendment or omission as it may be deemed to be necessary or expedient, apply in relation to the University for so long as the First Statutes in respect of the same subject-matter are not made under sub-s.(1) of s. 31. Sri Kacker submitted that it has been left to the sweet will and unguided discretion of the State Government to apply any Statute or Ordinance under the Agra Act with any kind of addition, amendment or omission as the State Government thought necessary or expedient and that amounted to excessive

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delegation of legislative power Reference was made to *Jalan Trading Company v Mill Mazdoor Sabha* (1) wherein the Supreme Court struck down s 37 of Payment of Bonus Act, 1965 on the ground that it exceeded the permissible limit of delegations of legislative authority It was found that the section authorised the Government to determine for itself what the purposes of the Act were and to make provisions for removal of doubts and difficulties which was the function of the Legislature and the power to remove the doubts and difficulty by altering the provisions of the Act would in substance amount to exercise of legislative function which could not be delegated to an executive authority There is no analogy between the invalid s 37 of the Payment of Bonus Act, 1965 and cl (aa) of sub-s. (1) of s 50 of the Meerut Act. Here the difficulty is indicated by the Legislature itself, that is, non-framing of the first Statutes of the University The State Government is not empowered to amend or modify the provisions of the Meerut Act, after forming an opinion what the purpose of the Act was and what difficulty was to be surmounted. Here the difficulty indicated is obvious The Meerut Act could not be worked out unless the first Statute had been framed along with it That was the difficulty The Statute and Ordinances under the Agra were already known and any of them were only left for mechanical application with the necessary adaptations and modifications. No doubt some choice was left with the State Government as to what addition, amendment or omission is to be resorted to for adapting the Statutes of Agra University but that would not amount to excessive delegation of legislative authority. See *Re The Delhi Laws Act* (2) The attack on the vires of cl.

(1) AIR 1967 SC 691

(2) AIR 1951 SC 332.

(aa) of sub-s. (1) of s. 50 thus fails. The Statutes of Chap. XVIII of the Agra University cannot, therefore, be equated with the regulations made by the Warehousing Corporation or the Indian Airlines Corporation.

32. For the Management the argument that even if the Statutes under Chap. XVIII of Agra University be deemed to be part of the Meerut Act still they will operate only in the field of affiliation was again reiterated. Reference was made to two Supreme Court decisions *Km Regina v. St. Alloysius High School* (1) and *Dr Rampal Chaturvedi v University of Rajasthan* (2). In *Km Regina's* case (1) the Supreme Court found that Part II of Rules relied upon by *Km Regina* as binding on the respondent school having not been framed under s 56 of the Madras Elementary Education Act, 1920 had no statutory force and then held that nothing in those rules conferred upon an aggrieved employee of a school any right enforceable at law in the event of the Management of an Elementary School refusing to comply with those rules which, *inter alia*, enjoined upon a school to abide by the directions given thereunder by the Education Officers of the Government named therein. The ratio of the decision in *Km Regina's* case (1) is, therefore, not attracted in the circumstances of the case before us. In the case of *Dr Rampal Chaturvedi* (2), the decision of the Supreme Court turned on the fact that mere appointment of some Professors and Principal in the Faculty of Medicine of the University ignoring the provisions of Ordinance 65 framed by the University laying down minimum qualifying experience in service could not render the appointments invalid as those appointments were validly made under the rules framed by the Governor under Art. 309 of the Constitution and Dr

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(1) AIR, 1971 SC 1990

(2) 1970 (1) SCC 75

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Rampal Chaturvedi had no right to approach the High Court by means of a petition for a writ of *quo warranto*. The ratio of this case also does not, therefore, help the Management of the colleges.

33. In both the above cases cited on behalf of the Management certain observations were made that the provisions on which the petitioners relied pertain to the sphere of recognition and affiliation but that circumstance was not made the basis of the decision. In *Lm. Regina's* case (1) the specific rule relied upon by the petitioner was not found to have any force of law on an examination of the entire scheme of the Madras Education Act. In *Dr. Rampal Chaturvedi's* case (2) the Supreme Court did not examine the true nature of Ordinance 65 framed by the Rajasthan University, as it found the impugned appointments justified under the rules framed by the Governor under Art. 309 of the Constitution, which had an overriding effect.

34. Reverting to the main argument, it was next contended on behalf of the Management of the colleges that even though the Statutes in Chap. XVIII of the Agra University Statutes may have derived their force from s. 50(1)(aa) of the Meerut Act yet they will not confer any enforceable right on the teacher or the Principal as Statute 29-A has the effect of making the conditions of service of teacher of affiliated colleges contractual. It was submitted that s. 25-C(1) of the Agra Act required a written contract which will contain such terms and conditions as may be laid down by the Statutes, so all those provisions in Chap. XVIII which answer to the definition of terms and conditions of service will form a part of the written contract. It was further emphasised that the duty imposed on the Management and the power of approval to be exercised

(1) AIR, 1971 SC 1920.

(2) 1970 (1) S.C.C. 75

by the Vice-Chancellor under sub-s. (2) of s. 25-C of the Agra Act have been subjected to provisions to be made by the Statutes hence it is the Statutes which will prevail over the section and since the matter of approval by the Vice-Chancellor also comprises one of the terms and conditions of service, it will also become a part of the contract. In other words, the submission was that no matter pertaining to terms and conditions of service of a teacher or Principal of an affiliated college is left to be governed and regulated by the provisions of the Act or the Statutes independently of the contract as every term and condition of service has to be reduced into a contract.

35. Sub-s (1) of s 25-C of the Agra Act says that every teacher in an affiliated College shall be appointed under a written contract which will contain such terms and conditions as may be laid down by the Statute. The plain meaning of the language used is that whatever terms and conditions which the statutes lay down for being embodied in the written contract will form the part of the written contract under which the teacher in an affiliated college would be appointed. The Statutes have to be seen for finding out the terms and conditions that shall form part of the written contract. It is not possible to give the meaning to the language of sub-s (1) that whatever pertains to terms and conditions of service of a teacher in the Statutes shall form part of the written contract. It is only those terms and conditions of service which the Statutes requires to be embodied in the written contract that will form part of the contract. As already pointed out above, Statute 29-A of Chap XVIII specifies the points pertaining to the condition of service of teachers of affiliated colleges for being reduced into a definite written contract of service and the model form of such written

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contract is also prescribed. Once a document pertaining to the permanent service is executed embodying the points specified under Statute 29-A it will answer the requirements of sub-s (1) of s 25-C of the Agra Act. Eight points have been enumerated in Statute 29-A of Chap XVIII. None of the eight points mentioned as terms or conditions of service cover the conditions found in sub-s (2) of s 25-C or Statute 30 of Chap XVIII. Thus the Statute 29-A does not lay down that what is contained in sub-s (2) of s 25-C and Statute 30 must form part of the written contract.

36 The form of agreement appended at the end of Chap XVIII which is required to be followed for members of the staff other than the Principal in an affiliated college does not contain any clause in the nature of the provisions found in Statute 30 though there is a cl (11) to the effect that the decision of the college Management to dismiss the teacher shall not take effect unless it has been approved by the Vice-Chancellor in accordance with the provisions of s 25-C (2) of the Act. In the form of agreement with the Principals of the affiliated colleges appended at the end of Chap XVIII cls 11, 12 and 13 are relevant. They are reproduced for convenience of reference.

"11 That the services of the Principal shall not be terminated except by a resolution of the Managing Committee passed in a meeting of the Committee expressly called for the purpose and attended by at least two-thirds of the total membership and such resolution to be effective must be passed by two-thirds majority of the members present.

12 That before such a resolution is passed the Principal shall be acquainted in writing with the grounds on which it is proposed to remove him

and he shall be given enough time (not less than fifteen days) to submit his explanation which shall be duly considered by the Managing Committee before the decision of removal is taken. The Principal shall also have the right to be personally present at the meeting of the Managing Committee to explain his case but he shall withdraw from the meeting when the vote is taken.

13. That the resolution of the Managing Committee removing the Principal shall operate only when approved by the Vice-Chancellor."

37 Statute 30 says that every decision of the Management of an affiliated college to dismiss or remove from service a teacher shall be subject to the provisions of that Statute. It is not disputed that Principal is included within the word 'teacher' in the said Statute. Worded as it is the Statute has an overriding effect. An order of dismissal or removal from service of a teacher by the Management of an affiliated college cannot be made unless the provisions of the said Statute have been complied with. The provisions contained in Statute 30 are not a part of the contract of a teacher. Neither Statute 29-A provides for it nor the appended model form. Non-compliance with the provisions of Statute 30 by the Management would not amount to a breach of contract as the provisions of the Statute 30 are not the terms and conditions of the written contract. The question is whether cl (12) mentioned above in the form of agreement with the Principals of colleges excludes the Principal from taking benefit of the provisions of Statute 30 in the matter of his removal from service. A comparison of cl. (12) with Statute 30 will show that while cl (12) of the agreement does not give the Principal the right of cross-examining witnesses if he so chooses and of call-

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ing and examining such witnesses in his defence as he may wish and the right of review and asking the Management to inflict a lesser punishment and so on, while Statute 30 confers all these benefits. If in the case of a Principal Statute 30 is held to be superimposed by cl. (12) of the agreement, then the Managing Committee even without affording an opportunity to the Principal of cross-examining the witnesses and of calling and examining the witnesses in his defence, may terminate the services of the Principal after meeting the requirements of cl. (12) and the Principal will have no remedy. Thus the Principal will have lesser protection than a teacher. For the same reason the mere inclusion of clauses in the agreement of the Principal and the teacher that the dismissal will not take effect till approved by the Vice-Chancellor will not mean that the provisions of sub-s. (2) of s. 25-C of the Agra Act will lose their efficacy as a rule of law and become contractual. To the phrase "subject to the provisions to be made by the Statute" occurring in sub-s. (2) of s. 25-C it is not possible to give the meaning that merely because Statute 29-A required a definite written agreement embodying specific points, the contract super-imposes itself and sub-s. (2) of s. 25-C of the Agra Act no longer remains operative *proprio vigore*. The position that emerges out, therefore, is that despite the requirement of a teacher of an affiliated college being appointed under a written contract containing such terms and conditions as may be laid down by the Statutes the provisions of sub-s. (2) of s. 25-C of the Agra Act and Statute 30 of Chap. XVIII continue to govern and regulate the terms and conditions of service of the teacher in the matter of termination of his services by the Management of the affiliated college and any breach of the provisions thereof will be a breach of law and not merely a breach of contract.



The present cases, therefore, fall within the rule of law of *Jodh's* case (1) and *Vidyaram Misra's* case (2) will have no application, inasmuch as in the case of Lucknow University the relevant provisions of the Act and the Statutes did not leave out anything pertaining to terms and conditions of a teacher of an associated college which was not required to be reduced in the form of a contract. In the case of teachers of the associated college of Lucknow University as found by the Supreme Court the right of a teacher was purely a contractual right unprotected, unregulated and uncontrolled by any provision of law independent of the contract.

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38. Having held above that the provisions of Statute 30 of Chap. XVIII and sub-s. (2) of s. 25-C of the Agra Act control and regulate the service conditions of the teacher of the affiliated college independently of written contract, the answer to the question whether the relationship between a teacher and the Management of an affiliated college is that of pure master and servant, that is to say, wholly contractual will be obvious. As pointed out by the Supreme Court in *Jodh's* case (1) such provisions are made by the University in exercise of its powers of affiliation granted by law to the University and are made with the object of affording protection to the teachers of the affiliated college against any arbitrariness of the Management in the interest of efficiency in the field of education. When a college is admitted to the privilege of affiliation or association with the University, its Management is bound by the conditions of affiliation imposed by the University under the Act incorporating such University and the Management cannot be heard to say with impunity that though it has not complied with the conditions

(1) 1965 (2) S C R 713.

(2) A I R 1972 S C 1450

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thus imposed and at its sweet-will has put an end to the service of the teacher, will pay damages to him if the termination is found to be wrongful. The law declared by the Supreme Court in *Jodh's* case (1) clearly lays down that where the services of a teacher are terminated in the breach of the provisions of the Act or the Statutes of the University which *proprio vigore* can be enforced independent of the contract the teacher will have an enforceable right. In *Vidyaram Misra's* case (2) it has been held that where the provisions of the Act or Statutes of the University themselves provide that all that pertains to the terms and conditions of service will be reduced into a written contract, then the only remedy of the teacher is by way of suit for damages as the termination of his service in the breach of the terms and conditions of his service would merely amount to breach of contract. To that extent the rule of law laid down by this Court in the case of *Dr. Puri v. Meerut University* (3) is no longer good law as the Supreme Court has not recognised the doctrine whereby parties are required to enter compulsorily into a contract embodying the terms and conditions laid down by that law, then the relationship is not that of pure master and servant and any breach of the terms and conditions of service would amount to a breach of law.

39 The matter can be examined from another angle. It was argued by Sri *Shanti Bhushan* for the Principal of the Shamli College that the right flowing from s 25-C(2) of the Agra Act and the parallel provisions of s 28(3) of the Meerut Act in favour of the teacher is a legal right independent of the rights flowing from the written contract. He further submitted that the same is the position with regard to the rights conferred by Statute 30 of Chap XVIII of the Agra

(1) 1965 (2) S C R 718

(2) A I R 1972 S C 1450

(3) 1969 A L J 612.

University Statutes • Submission was that the teacher enjoys an immunity or a protection and no decision of the Managing Committee dismissing or removing him can be taken without complying with Statute 30 and it will be effective only when approved by the Vice-Chancellor. The object, the fulfilment of which the said provisions manifest, is that the disruption of the relationship of employer and the employee between the Management and the teacher cannot take place without first fulfilling the duty imposed on the employer and further only when a third party that is, the Vice-Chancellor assents to it. The act of assent or approval by the Vice-Chancellor is not and cannot be part of the contract between the employer and the employee but is a super imposition by law outside the contract. There appears to be great tenability in this contention. On behalf of the Management it was, however, submitted as pointed out above that dismissal or removal from service of a teacher by the Management of an affiliated college no doubt shall not take effect until it has been approved by the Vice-Chancellor but this section makes it subject to the provisions to be made by the Statutes and since the Statutes prescribe for the terms and conditions of service to be embodied in a written contract, the act of the approval by the Vice-Chancellor in order to give effect to the dismissal or removal of a teacher becomes a part of the contract of service. It is difficult to agree with this submission. No Statute can reduce the necessity of approval by the Vice-Chancellor to a mere contract between the Management and the teacher as that would imply that the parties can contract themselves out of it and render the Act nugatory. Such a term in the contract will be illegal.

40 The phrase "subject to provisions to be made by the Statute" occurring in the s 25-C(2) will only

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mean that the manner of reporting of the decision by the Management of an affiliated college to dismiss or remove from service a teacher and the manner of approval by the Vice-Chancellor is to be regulated and controlled by the Statute Cl. (10) of Statute 30 of Chap XVIII lays down the manner and the procedure in this respect. It provides that the decision of the Management about dismissal or removal from service of a teacher shall be reported forthwith along with a complete report and all connected papers to the Vice-Chancellor who shall consider whether the provisions of the above Statutes have been complied with. It is significant to note here that the Vice-Chancellor is enjoined to consider whether the provisions of the Statute are complied with and not whether the terms of the written contract have been complied with. If the Vice-Chancellor is satisfied that the provisions of the Statutes have not been complied with and the grounds on which a teacher has been dismissed or removed from service are not adequate he will disapprove the decision of the Managing Committee. The decision of the Vice-Chancellor shall be communicated to the Management within six weeks of the receipt of the proposal for compliance. If, however, the Vice-Chancellor feels that any particular point needs clarification he will call upon the Committee of the Management and the teacher concerned to give the necessary clarification before giving his decision. The decision of the Managing Committee will operate only if and when approved by the Vice-Chancellor. Thus cl (10) of Statute 30 which as held above is not an essential part of the written contract contemplated by Statute 29(A), when it says that the resolution of the Committee punishing the teacher shall operate only when and to the extent approved by the Vice-Chancellor reinforces what is provided by the Act. The Committee of Management and the Vice-

Chancellor have to act within the ambit of the said clause and this is what is meant by subjecting the taking of effect of the decision on the approval of the Vice-Chancellor to the Statute and nothing more

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41 The provisions of Statute 30 appear to be basically founded on the well established principles of natural justice for affording adequate and reasonable opportunity to the teacher accused of misconduct. There appears to be force in the submission of the learned counsel appearing for the teachers that it could not have been the intention of the framers of the Act and the Statutes that any breach of the rules of natural justice as embodied in Statute 30 would be merely a breach of contract. This reinforces the conclusion that Statute 30 was not intended to be merely an essential ingredient of the terms and conditions of the contract.

42 To sum up this part of the case it is clear that s 25-C(2) of the Agra Act, parallel s 28(3) of the Meerut Act and the Statute 30 of Chap XVIII of the Agra University are *proprio vigore* enforceable and any breach of any terms thereof will be breach of Statute and not a breach of contract.

43 The next important question that remains to be considered is the nature and status of the Committee of Management of the colleges concerned. Relying on *Dr Vidyaram Misra v S I N College* (1) the learned counsel for the colleges contended that the Committee of Management of the colleges concerned is merely a private body and not a Statutory body. Para 13 at p 1455 of the report was referred. The Supreme Court observed:

“Besides, in order that the third exception to the general rule that no writ will lie to quash an order terminating a contract of service, albeit il-

(1) AIR 1973 SC 1450

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legally, as stated in *S R Tewari's* case (1) might apply, it is necessary that the order must be the order of a statutory body acting in breach of a mandatory obligation imposed by a Statute. *The college, of the Managing Committee in question*, is not a statutory body and so the argument of Mr *Satalvad* that the case in hand will fall under the third exception cannot be accepted. *The contention of counsel that this Court has subsilently sanctioned the issue of a writ under Art 226 to quash an order terminating services of a teacher passed by a college similarly situated in Jodh's case (2) and, therefore, the fact that the college or the managing committee was not a statutory body was no hinderance to the High Court issuing the writ prayed for by the appellant has no merit* and this Court expressly stated in the judgment that no such contention was raised in the High Court and so it cannot be allowed to be raised in this Court' (*Italicised mine*)

44. A reading of the above quoted extract would show that no question was raised in *Vidyaram Misra's* case (3) that the Managing Committee of S N J College was a Statutory body. An argument was advanced on the footing that though it was not a Statutory body yet in *Jodh's* case (2), the fact that the Managing Committee of the College being a non-statutory body was not considered as hinderance to the High Court issuing a writ, therefore, the Supreme Court would be deemed to have *subsilently* sanctioned in the issuance of a writ against a non-statutory body. This argument was repelled. Can it be said then that the observation of the Supreme Court "the college, or the Managing Committee in question, is not a statutory

(1) (1964) 3 SCR 55. AIR. 1964 C 1680 (2) (1965) 2 SCR 718 (3) AIR 1972 SC. 1450.

body", is a declaration of law to the effect that the Managing Committee of the Colleges affiliated to all the Universities are non-statutory bodies? No legal principle or doctrine can be evolved from the said observation of the Supreme Court. It is at best a declaration of fact that the Managing Committee of the S. N. J. College was not a statutory body. Since it is only a declaration of law which is binding on all courts under Art. 141 of the Constitution and not a declaration of fact, the learned counsel for the Management cannot press into service Art. 141 of the Constitution. The said observation also cannot be binding as a precedent inasmuch as the question was not raised before the Supreme Court that the Managing Committee of the S. N. J. College was a statutory body. Therefore, the decision of the Supreme Court in *Vidyaram Misra v S. N. J. College* (1) does not hinder the examination of the question whether the Managing Committee of the colleges concerned in the case before us can be said to be a statutory body within the meaning of the third exception laid down by the Supreme Court in *Sri Nath Tiwari's case* (2).

45. It is admitted that the Shamli College is owned by a Registered Society. Similarly the Dayanand College, Dehra Dun is owned by a Registered Society. The governing body of either of the two institutions certainly will not be a statutory body. It was urged that the governing body of each of the two colleges or any smaller body appointed by it under its registered rules to manage the college will also not be a statutory body as a statutory body is that body which is created by a Statute. For the teachers it was submitted that the Committee of Management of an affiliated college in its constitution, composition and functions is not a body of persons coming into existence under the rules

(1) A.I.R. 1972 S.C. 1450.

(2) A.I.R. 1964 S.C. 1680

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of the Registered Society but is a body of persons having a separate composition and is constituted by the University Act and the Statutes

46. Statute 14 of Chap XVIII of the Agra University Statutes by its cl (c) lays down that a college applying for affiliation to the University in any faculty shall be required to satisfy the Vice-Chancellor with regard to that it is suitably organised, is under proper management and the constitution of the Managing Committee provides (1) for the Principal of the College to be an *ex officio* member of the Managing Committee of the college, (2) for the representation of the teacher on the Managing Committee, one teacher who is to be head of his Department to be chosen on the Managing Committee in order of seniority in the college by rotation for one academic season Statute 7-03 of the First Statute of the Meerut University by its cl (d) requires the satisfaction of the Vice-Chancellor as to be constitution of the Management of the proposed college to be so broad-based as to include members from different interested groups who can be relied upon to take an enlightened interest in the affairs of the college and it further provides for representation on the Management of (1) the Principal of the college, an *ex officio* member, (2) the senior most teacher (as judged by length of service as a teacher in the college concerned), (3) two persons nominated by the Executive Council for a term of five years Then by cls (e), (f) and (g) placed certain limitations as to its membership and constitution For the purpose of the cases referred it is the Statute 14 of Chap XVIII of the Agra University Statutes which applies vide s 50(1)(aa) of the Meerut Act

47. Under s 5(ii) of the Meerut Act a power has been conferred on the University to admit to the privileges of affiliation under the prescribed conditions



any college situate within the area of that University. S 2(a) of the said Act defines an affiliated college as being an institution affiliated to the University in accordance with the provisions of the Act and the Statutes of the University. In cl (i) of s 2 of the Meerut Act the Management 'means the Managing Committee or body charged with managing the affairs of an affiliated college. Chap XVIII of the Agra University Statutes prescribes the conditions for admitting any college to the privileges of an affiliation to the University. One of the conditions prescribed in Chap XVIII of the Statutes as mentioned in Statute 14, stated above, is that the College is suitably organised, is under proper management, and the constitution of the Managing Committee conforms to the provisions therein. Once the Managing Committee of an affiliated college is constituted and composed in accordance with the Statute 14, it becomes the 'Management' as defined in cl (i) of s 2 of the Meerut Act. It is not disputed that the two colleges concerned are affiliated colleges of the Meerut University as defined under s 2(a) of the Meerut Act. It is further not disputed that the Managing Committee of each of the two colleges is constituted and composed in accordance with the Statutes. The Managing Committee of the colleges then becomes the 'Management' as defined under the Meerut Act. It is not possible to accept the submission of the learned counsel for the Management that the Managing Committee of the colleges is a body constituted under the rules of the Registered Society, which owns those colleges. How a Managing Committee of an affiliated college is to be constituted is laid down by the Statutes relating to affiliation and its constitution and composition is not left to the free will of the members of the Registered Society. It may be that the very personnel of the managing body constituted under the rules of

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the Registered Society even en-block become a part of the personnel of the Managing Committee of the affiliated college but the fact that along with them are introduced as members the Principal of the college and a representative of the teachers by rotation as enjoined by the Statute of affiliation, the Managing Committee so constituted could not be the same as the original committee constituted under the rules of the Registered Society. The Meerut Act and the Statutes introduce a foreign element into the Management consisting of persons who may not be the members of the Registered Society. Thus the Management of an affiliated college is a creation of the Meerut Act and the Statutes and performs such duties and functions as are imposed upon it by the Meerut Act and the Statutes. It is, therefore, not possible to accept the argument that the Management of an affiliated college is created by non-statutory agency, that is the Registered Society. Here is a case where under the scheme of the Meerut Act and the Statutes a certain proportion of the members constituting the Managing Committee of the College, be in majority are left at the choice of the Registered Society and certain members constituting it, though in minority, are imposed by the Statutes. The recognition of those members constituting the Managing Committee who are appointed at the choice of the Registered Society is itself sanctioned by the Statutes. The body as a whole with the Principal and the representative of teachers then becomes the 'Management' as defined under s 2(1) of the Meerut Act. If it be held that the existing committee selected or elected by the Registered Society is constituted as the Managing Committee with the Principal as *ex officio* and the representative of the teachers by rotation as additional member, even so the Meerut Act and Statutes adopt such a body as the Management. Thus

in any view the 'Management' of the affiliated college will remain a creature of the Meerut Act and the Statutes. The power to appoint teachers of the affiliated colleges is conferred on the 'Management' in the manner prescribed by the Statutes, vide s 26(1) of the Meerut Act. No other body of persons owing or administering the college except the 'Management' as defined under the Meerut Act can employ a teacher. The duty to appoint the teacher, therefore, is cast on the 'Management' by the Meerut Act. Thus the 'Management' acts as a statutory functionary when appointing a teacher of an affiliated college. It follows, therefore, that when the Management dismisses or removes a teacher it also acts under the authority of the Statutes as a statutory functionary. It is the Management as defined under s 2(i) of the Meerut Act who is the employer and not the Registered Society. Once the Committee of Management of an affiliated college is constituted as explained above, it no longer remains under the control or supervision of the Registered Society owing the College. The Vice-Chancellor of the University exercises general control over the affairs of the affiliated college under sub-s 4 of s 10 of the Meerut Act. Since the affairs of an affiliated college almost in all respects are supervised by the Committee of Management of the College, the Vice-Chancellor of the University will have a controlling hand over it. Further by its s 6 the Meerut Act empowers the State Government to cause an inspection and enquiry to be made of any affiliated college and compel the compliance of any direction given by it to the Management of the affiliated college. Thus under the scheme of the Meerut Act the Management of an affiliated college does not function as an autonomous independent body of private persons but is supervised

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and controlled by the State Government and the Vice-Chancellor of the University.

48 It was then suggested on behalf of the Management that in so far as the teacher is concerned, his relationship with the Management remains contractual as the Meerut Act lays down that every teacher of an affiliated college will be appointed under a written contract and without first entering into a contract the Management will not have any jurisdiction over the teacher. The submission was that the Management of a college even if said to be functioning under the Meerut Act and Statutes, will have no jurisdiction over a teacher unless a contract is entered into between the Management and the teacher and the Management being that of a private college entirely managed by private funds the mere fact of affiliation of the College to the University will not make it quasi-public authority amenable to the jurisdiction of the High Court under Art 226 of the Constitution. Reliance was placed on *Josheph Mundassery v Manager, St Thomas College, Trichur* (1) wherein it has been held that a Management of private college entirely managed by private funds would not be a quasi-public authority merely because of its affiliation to an University. Even if this be true, it will not help in solving the problem arising before us. In the case cited the learned Judges found that there was nothing in the Madras University Act, the Statutes, the Ordinances and the Regulations imposing any duty on the Management of an affiliated college in regard to the conditions and terms of service of its teachers and they held that a mere resolution of the Executive Council of the University approving of the report of inspection recommending that in case of dispute between the Management and its teacher, the rules applicable to Government servants would apply will not become the law of the University. The deci-

(1) AIR 1954 Tra Co 199

sign in the said case thus turned on the absence of any provision in the University Act, Statutes, Ordinances and Regulations regulating and controlling the relationship between the Management of an affiliated College and its teacher. This is not the case here. It has been demonstrated above that the Meerut Act and the Statute do regulate and control the relationship between the Management of affiliated college and its teachers imposing certain duties on the Management and the Vice-Chancellor. Though the relationship between the teacher and the Management of an affiliated college originates from a contract but once such a relationship arises and that relationship in certain respects is controlled and regulated by the Meerut Act and the Statute and the duties are imposed on the Management by the Meerut Act and the Statute in regard to the relationship then in performing its duties, the Management would be subject to the power of judicial review by the High Court. In "judicial Review of Administrative Action" *S A de Smith* at p 391 (Second Edition) says

"On the other hand a body invested by Statute with jurisdiction over persons who have entered into contractual relationship with it may be subject to *certiorari* and prohibition although the occasion for the exercise of its jurisdiction does not arise until the contractual relationship is formed."

It has been shown above that the Meerut Act by its s 28(3) and the Agra Act by its s 25-C(2) impose a duty on the Management of an affiliated college and Statute 30 of Chap XVIII also imposes a duty on the Management which wholly fall outside the scope of the written contract. The Management while performing those functions will be exercising a statutory jurisdic-

<sup>3</sup> HC (ILR)—1973—11

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tion on the teacher not as a private body though a part of its membership may have been elected or selected originally by the Registered Society, a private body, and when it acts in breach of the provisions of the Act and the Statutes in any matter in regard to a teacher falling outside the scope of the written contract, it would be amenable to the jurisdiction of High Court under Art 226 of the Constitution. The Supreme Court appears to have approved of the above principle in *Roshan Lal Tandon v Union of India* (1). It observed:

"It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by the consent of both the parties, but by Statute or Statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more of status than of contract. *The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by public law and not by mere agreement of the parties*"  
 (Italicised mine)

49 In sum it can be stated that there may be bodies which are Statutory and which are non-Statutory. Statutory bodies may perform statutory functions and may perform non-statutory functions. When statutory bodies perform statutory functions their acts will be amenable to judicial review by the Court. When statutory bodies perform non-statutory functions their acts may not be amenable to judicial review by the

(1) A I R 1967 S C 1889 at 1894 para 6

court. When non-statutory bodies perform non-statutory functions then acts will not be subject to judicial review by the court but when they perform statutory functions there is no valid reason why it not be held that their actions will be amenable to judicial review by the Court inasmuch as non-statutory bodies when performing statutory functions will be nothing else than mere instrumentalities acting under the Statute which imposes duties upon it affecting the rights of third persons and parties.

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50 The conclusion therefore is that the Management of an affiliated college of the Meerut University is a statutory body or a statutory functionary while discharging its functions under the Act and the Statutes within the meaning of the third exception formulated by the Supreme Court in *S. R. Tewari's* case (1)

51 It has been demonstrated that the Management of an affiliated college of the Meerut University when appointing a teacher or when terminating his service functions as a statutory body, s. 25-C(2) of the Agra Act or the parallel s. 28(3) of the Meerut Act and Statute 30 of the Chap. XVIII of the Agra University Statutes are enforceable *Proprio vigore* and though the origin of service of a teacher or Principal is contractual but once appointed to his post he acquires a status as attached to that relationship are rights and duties imposed by the Meerut Act and the Statutes.

52 The discussion above is sufficient for formulating the answers to the three propositions framed in para 11.

(1) The service of a teacher including the Principal of the affiliated colleges in question is not purely contractual and is regulated and controlled

(1) AIR 1964 SC 1680

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b) the provisions of the Meerut Act and the Statutes

(2) The 'Management' of the two colleges concerned acts as a statutory body or statutory functionary when it takes action to terminate the service of a teacher

(3) The teacher will be entitled to an appropriate injunction and a declaration of statutory invalidity of the action taken against him in terminating his service by the Management in violation of any provision of the Meerut Act and Statutes

53 In Second Appeal No 2973 of 1972, Vaish College, Shamli v Sri Laxmi Narain, the plaintiff-respondent Laxmi Narain would be entitled to the relief claimed in the plaint on the facts and circumstances of the case

54 In Special Appeal No 1516 of 1971, the Board of Management of Dayanand Brijendra Swarup Degree College v Suresh Chandra Verma, the petitioner-respondent Suresh Chandra Verma will be entitled to the appropriate relief if the Special Appeal Bench affirms the factual findings recorded by the learned single Judge

*Writ Petition No 858 of 1970*

55 Now the question referred in Writ Petition No 858 of 1970 Ahmand Husain v Aligarh University be considered That question is whether a writ petition is maintainable by an employee of an University which is a Statutory body on the ground that his services have been terminated or he has been reduced in rank in violation of the provisions of the regulations framed by the University?

56 The question is couched in words general in nature The question postulates that the University



is a statutory body, which it certainly is. It has been laid down by the Supreme Court in *S R Tewari's case* (1) that when a Statutory Body acts in the breach of a statutory provision while terminating the services of its employee its action is amenable to the writ jurisdiction of the High Court under Art 226 of the Constitution. The question therefore, reduces to whether the regulations of which the breach is complained of are in the nature of statutory regulations or provisions? If the answer is in the affirmative then the remedy under Art 226 of the Constitution will be available when the University terminates the services of its employee in the breach of such regulations.

57 Since a reference has been made in the case of Aligarh University, the nature and the character of the Regulations framed under the Aligarh University Act, 1920 of which the breach is complained of by the petitioner have to be examined. The petitioner is a Head Clerk in the Aligarh Muslim University. He was promoted to the post of Assistant Registrar and was kept on probation for one year. The petitioner claimed that he successfully completed the period of probation and became confirmed in the post. The petitioner, however, was reverted to his substantive post of Head Clerk. The petitioner has questioned the validity of the resolution of the Executive Committee of the University in his petition under Art 226 of the Constitution. He questioned the validity of the order on the ground that he was a confirmed Assistant Registrar and the resolution refusing to confirm him in the post of Assistant Registrar and reverting him to the post of Head Clerk amounted to his removal from the post of Assistant Registrar and reduction in rank without affording him a reasonable opportunity of showing cause. The writ

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petition was heard by our brother G C MATHUR. An objection was raised by the learned counsel for the University that the petitioner's remedy, if any, lay by way of a suit for damages. Reliance was placed on behalf of the University on a decision of the Division Bench in the case of *Mohd Nafis Khan v Aligarh University* (1). Brother MATHUR held that another Division Bench decision to which he was a party in *V P Kapoor v University of Roorkee* (2), was in conflict with the former decision. He, therefore, directed the reference.

58 It appears from the petition that the petitioner was appointed as officiating Assistant Registrar by the Vice-Chancellor on 23rd January, 1963. His substantive post at that time was that of a Head Clerk in the University. The action of the Vice-Chancellor appointing the petitioner as an officiating Assistant Registrar was ratified by the Executive Council of the University. The petitioner was then appointed in temporary capacity as Assistant Registrar till such time as regular arrangement was made or till further order, whichever was earlier. Then by a resolution of the Executive Council of the University, held on 6th February, 1965, the petitioner was appointed as Assistant Registrar of the University on probation of one year with effect from 7th February, 1965 on the recommendation of a duly constituted selection committee. The petitioner claims that after he had completed the period of probation of one year, he should have been confirmed as Assistant Registrar of the University with effect from 7th February, 1966 but the University neither confirmed the petitioner nor extended the period of probation and, therefore, the petitioner became confirmed in the eye of law as an Assistant

(1) Spl App No 95 of 72 dated 21-4-72 (2) Spl App no 540 of 1971 dated 19-1-1972

Registrar of the University but the Registrar of the University by his letter dated 5th April, 1966 informed the petitioner that the Executive Council of the University at its meeting held on 26th March, 1966 has approved the extension of the petitioner's probationary appointment as an Assistant Registrar of the University by six months from 7th February, 1966. One of the challenges raised by the petitioner in the writ petition was that he had already become confirmed and the Executive Council of the University had no jurisdiction to extend the probation retrospectively. The petitioner then further stated that even after the expiry of six months the so-called extended period came to an end on 6th August, 1966 but the Executive Council of the University did not pass any order either extending the period of probation or confirming the petitioner on the post. Then it was said that the Executive Council on 9th February, 1966 further extended the probation period by three months. This action of the Council was also challenged on the same ground as stated above. When this extended probation came to an end on 6th November, 1966, even then the Executive Council neither extended the probation nor confirmed the petitioner. Yet by a resolution passed on 22nd December, 1967 the Executive Council again extended the period of probation of the petitioner up to 31st January, 1968. This action was again questioned by the petitioner on the same ground stated above. When this extended probation came to an end, the Vice-Chancellor by his order extended the probation till the date of the next meeting of the Executive Council which was held on 6th July, 1968 at which no action was taken by the Executive Council either confirming the petitioner or extending the probation. It is alleged that the Executive Council extended the

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petitioner's term of appointment from 1st April, 1968 and ultimately on 15th February, 1970 refused to confirm the petitioner on the post of Assistant Registrar. The main attack of the petitioner seems to be that the resolution of the Executive Council dated 13th February, 1970 amounted to termination of the petitioner's service as an Assistant Registrar of the University without affording him an opportunity to show cause. The petitioner appears to be complaining of breach of Regulation 3. A subsequent amendment of this Regulation was characterised as *ultra vires* and not applicable to his case. This is a question on which we are not called upon to express any opinion. The writ petition seems to be based on the petitioner's claim that he was a permanent Assistant Registrar and the resolution of the Executive Council of the University not confirming him amounted to termination of his service as Assistant Registrar and reduction in rank. On this basis the petitioner sought an order, writ or direction for quashing of the resolution of the Executive Council dated 13th February, 1970 and as well as for quashing of the various orders of the Vice-Chancellor and the Executive Council of the University.

59 In the counter-affidavit filed on behalf of the University the main averments were that while the petitioner worked as a probationer, his work was not found satisfactory he having been warned from time to time and that he never successfully completed the period of probation though it was extended repeatedly.

60 It is not disputed that the Aligarh Muslim University is constituted as a body corporate under the Aligarh Muslim University Act, 1920 (hereinafter called as the Act) and thus is a statutory body. The Executive Council is an Authority of the University and derives its powers from the provisions of the Act, Sta-

tutes, Ordinances and Regulations framed thereunder. It is the settled law that the power of a statutory body flows from its corporative character and it is limited by the Statute constituting it. The courts in appropriate cases have power to declare an action of a statutory body illegal and *ultra vires* if found acting in breach of a mandatory obligation imposed by the Statute. It follows, therefore, if in terminating the services of the petitioner as Assistant Registrar and reverting him to his substantive post of Head Clerk the University or any of its Authority acted in the breach of any Statutory provision the petitioner would be entitled to the appropriate relief under Art. 226 of the Constitution.

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61 In answering the question referred, the real nature and character of the Regulations framed by the Executive Council of the Aligarh University has to be determined. If the Regulations have statutory force then the answer would be that the writ petition will be maintainable.

62 S. 31 of the Aligarh Muslim University Act empowers the Authorities of the University to make Regulations consistent with the Act, Statutes and the Ordinances providing for all matters which by Act, Statute or the Ordinances are to be prescribed by the Regulations and providing for all other matters concerning such Authorities or Committees appointed by them not provided for by the Act, Statute and Ordinances. As observed above, the Executive Council is an Authority of the University and it is the Executive Body of the University presided by the Vice-Chancellor. The constitution and the terms of office of the members and the powers and duties of the Executive Council are as prescribed by the Statutes. Under Statute 16 the Executive Council has been conferred the power to appoint members of the administrative staff. The

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petitioner is a member of the administrative staff. He was appointed by the Executive Council on an administrative or ministerial post created by the University under sub-s (11-B) of s 5 of the Act. There is no dispute that Chap IX of the Regulation framed by the Executive Council of the University regulating the conditions of service of the officers or servants of the University apply in the case of the petitioner. The petitioner was appointed on probation as Assistant Registrar. Reg 3 of Chap IX applied. One of the contentions of the petitioner is that since the probation could not be extended beyond two years, he became automatically confirmed in his post immediately on the expiry of two years as no order terminating the probation was passed prior to the expiry of two years. This is disputed by the learned counsel for the University, who contended that under Reg 3 there is no automatic confirmation. On this question we express no opinion. The Executive Council being the appointing authority had under Reg 10 of Chap IX the power to dispense with his services as Assistant Registrar. The argument for the petitioner was, assuming the petitioner was still on probation, if he was considered incompetent then he was entitled to a reasonable opportunity to explain his conduct and if his services were no longer needed then six months' notice was necessary stating that his services were no longer needed.

63 *Shri Hyder* appearing for the University contended that the reversion of the petitioner to his substantive post was not in the breach of the Regulations. In the alternative the learned counsel submitted that the Regulations framed under s 31 of the Act had no statutory force and even if there was any violation of the said Regulations, the petitioner was not entitled

to any relief under Art 226 of the Constitution, his remedy, if any, lay in suit for breach of contract.

64 We are not called upon to decide the question whether the reversion of the petitioner to his substantive post was not in the breach of the said Regulations. The question referred as framed assumes it. We have to examine whether the Regulations framed by the Executive Council of the University under s 31 have statutory force.

65. On behalf of the petitioner reliance was placed on the case of *State of U P. v Baburam Upadhaya* (1) wherein the Supreme Court held that if a Statute could be made by the Legislature within permissible limits, rules made by an Authority in exercise of powers conferred thereunder would likewise be efficacious within the said limits and they must be treated for all purposes of construction or obligation exactly as if they were in the Act and of the same effect as if they were contained in the Act. The Act empowers the Executive Council to frame Regulations. It is in exercise of that power that the Regulations were framed by the Executive Council. These Regulations would be in the nature of ancillary rules subserving the purpose of carrying out the essential policy laid down in the Act. The Executive Council having framed such Regulations will be bound by them. Cl (2) of Statute 3 lays down:

“It shall be the duty of the Vice-Chancellor to see that the Act, the Statutes, the Ordinances and the Regulations are duly observed and he shall have all powers necessary for that purpose”

The language of cl (2) of Statute 3 is as emphatic as it can be and there is no escape from the conclusion that the Vice-Chancellor has been vested with all powers to compel the Authorities of the University to duly observe the Regulations. A clear intention is

(1) AIR 1961 SC 751.

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manifest that the Regulations framed by any Authority of the University are meant to be observed and followed. The Vice-Chancellor is duty bound to see that a particular Authority of the University duly observes the Regulations. It was submitted by *Shri Hyder* that by Statute 3(5) the Vice-Chancellor is under a duty to give effect to the decision of the Authorities of the University, the Executive Council being an Authority of the University the Vice-Chancellor was bound to give effect to the decision of the Executive Council refusing to confirm the petitioner and reverting him to his substantive post. The learned counsel further submitted that Statute 3(2), therefore, cannot be interpreted as conferring on the Vice-Chancellor a power to override the decision of the Executive Council or to exercise a veto over it even though such decision may be given in contravention of the Regulations. The argument was that Statute 3(2) is only directory in nature and its provisions are not mandatory conferring an enforceable right on the petitioner. Reliance was placed on the following passage from Crawford "Statutory Construction" at p 516

"The question as to whether a Statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequence which would follow from construing it one way or the other."

66 It is difficult to accept the contention of *Shri Hyder* that Statute 3(2) was framed with intent and purpose of conferring on the Vice-Chancellor a power directory in nature or a discretionary power. Once



Statute 3(2) is read as vesting only a discretion in the Vice-Chancellor, decisions and orders of the Authorities of University, made without observing the Act, the Statutes, the Ordinances and the Regulations, will prevail, a state of affairs which cannot be countenanced. The use of the word "shall" in respect of the duty cast on the Vice-Chancellor can have only one meaning as imposing a mandate on the Vice-Chancellor that he must exercise his powers to see that the Act, the Statutes, the Ordinances and the Regulations are duly observed. This is further emphasised by the framers of the Statutes by enacting "and he shall have all powers necessary for that purpose." There will not arise any conflict between Statute 3 (2) and Statute 3(5), if the latter Statute is construed as casting a duty on the Vice-Chancellor to give effect to all such decisions of the University Authorities which are made after duly observing the Act, Statutes, Ordinances and the Regulations. Any decision made by the Executive Council without observing the Regulations, as is alleged by the petitioner, will not be given effect by the Vice-Chancellor and he will be under a duty to point out to the Executive Council the error and ask it to consider the matter in accordance with the Regulations applicable. Such a direction given by the Vice-Chancellor who is also a member of the Executive Council and presides over it will not amount to exercising a power of veto or any overriding power. The passage quoted above from *Crawford*, relied upon by *Shri Hyder* instead of supporting his contention militates against it.

67 It was then suggested by *Shri Hyder* that the Regulations made under s 31 of the Act have no force of law as they are merely measures for day-to-day administration and can always be changed. Statute 3(2) places the Act, the Statutes, the Ordinances and the

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Regulations on equal footing A Regulation is defined as a Regulation of the University for the time being in force. The mere circumstance that a particular Regulation can be changed at convenience from time to time will not derogate from its character of being a Regulation as defined by the Act to be duly observed by the Executive Council of University and will be the duty of the Vice-Chancellor to see that it is duly observed. Nothing, therefore, turns on the submission that a Regulation is a measure for a day-to-day administration and can always be changed. There is a clear intention manifest by the framers of the Act and the Statute that the Regulations are meant to be observed and followed and their breach by any Authority of the University in making a decision will make that decision invalid in the same way as a decision made in breach of the provisions of the Act, the Statutes and the Ordinances. The decision of the Division Bench of this Court in *Mohammad Nafis Khan v Aligarh Muslim University* (1) is not a well considered decision and is incorrect. The law declared by the Supreme Court in the cases of *Executive Committee of the U P State Warehousing Corporation v Chandra Kiran Tyagi* (2) and the *Indian Airlines Corporation v Sukhdeo Rai* (3) will not apply in determining the true nature and character of the Regulations made by the Executive Council of the Aligarh University as the scheme of the Act and the Statutes of the Aligarh Muslim University leaves no doubt that the Regulations have the same force as the provisions of the Act, the Statutes and the Ordinances of the Aligarh Muslim University.

68. The answer to the question referred is in the affirmative.

(1) Spl App no 95 of 1972 dated 24-1-1972.

(2) A I R, 1970 S C 1244.

(3) A I R 1971 S C. 1828.

R B MISRA, J —I have persued the judgment prepared by ASTHANA, J and I entirely agree with him. But as the question referred in these cases is of general importance and was debated before this Bench at great length, I would like to add a few words of my own

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The facts of the three cases have been given in detail by ASTHANA, J and it is not necessary for me to reiterate them again. I would rest content by giving a bare outline of the facts to bring out the points for consideration.

In Second Appeal No 2973 of 1971, the following two questions have been referred.

"1 Whether the view taken by the Division Bench of this Court in *Managing Committee of Meerut College, Meerut v Dr V Puri* (1) is no longer a good law in view of the two decisions of the Supreme Court in *Executive Committee of State Warehousing Corporation v Chandra Kiran Tyagi* (2) and *Indian Airlines Corporation v Sukhdeo Rai* (3)?

2 Can the Civil Court grant the relief of injunction in view of the facts and circumstances of the present case?"

The Division Bench admitting the Special Appeal No 1516 of 1971, referred the appeal itself to a Full Bench, as it doubted the correctness of the decision of the Division Bench in *Managing Committee of Meerut College, Meerut v Dr V Puri* (1).

In Writ No 858 of 1970, the learned single Judge referred the following question for decision by the Full Bench.

(1) 1969 A L J 612

(2) A I R 1970 S C 1244,  
(3) A I R 1971 S C 1828

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“Whether a writ petition is maintainable by an employee of an University, which is a statutory body, on the ground that his services have been terminated or he had been reduced in rank in violation of the provisions of the Regulations framed by the University?”

Learned counsel for the parties were agreeable that in the Special Appeal also, only the question of law involved alone should be decided and, thereafter, the case might be referred back to the Division Bench for deciding the appeal on merits. This Bench will, therefore, answer only the questions of law involved in these cases.

In the second appeal, Sri Laxmi Narain, the plaintiff-respondent, was the permanent Principal of the Vaish College, Shamli, district Muzaffarnagar, then affiliated to the Agra University. His services were terminated by the Management with effect from 24th October, 1966 on the ground that he had absented himself from duty. He challenged the termination order by filing a regular suit on the grounds, *inter alia*, that the termination of his services without the approval of the Vice-Chancellor of the Kanpur and Meerut Universities to which the college stood affiliated after the passing of the said Act, was void and ineffective and he continued to be in service. The defence of the Management, among others, was that the suit was not maintainable in view of s 21(b) of the Specific Relief Act. The trial court dismissed the suit on the ground that the appointment of the Principal was not under a written contract, as required by s 25(c) of the Agra University Act and so he could not seek the protection of the Act or the Statutes framed thereunder. The first appellate court, however reversed the judg-

ment of the trial court and decreed the suit holding that the Principal was entitled to the protection of the Act or the Statutes framed thereunder even in the absence of a written contract of service. The Judge has relied upon the decision of the Division Bench of this Court in *Managing Committee of Meerut College, Meerut v. Dr. V. Puri* (1) and of the Supreme Court in *Prabhakar Ram Krishna Jodh v A L Pande* (2). On appeal to this Court, the learned single Judge referred the aforesaid questions in view of the later decision of the Supreme Court.

In Special Appeal No. 1516 of 1971, Suresh Chandra Verma was a confirmed Geography teacher in Dayanand Vijendra Swarup Degree College, Dehra Dun, then affiliated to Agra University. On certain charges, framed against him, he was suspended and, eventually, removed from service as his explanation did not satisfy the Management. The resolution terminating his service in this case was approved by the Vice-Chancellor concerned. The teacher questions the validity and legality of the termination of the service in defiance of Statute 30 of Chap. XVIII of the Agra University Act which is applicable to the College, which stood affiliated to the Meerut University after the enforcement of the Kanpur and Meerut Universities Act, 1969. The learned single Judge relying on the *Managing Committee of Meerut College, Meerut v. Dr. V. Puri* (1) allowed the petition and set aside the order of termination on the ground that he had not been afforded reasonable opportunity, as required by Statute 30. The contention on behalf of the Management was that the jurisdiction of the High Court even under Art. 226 of the Constitution was restricted by s. 21(b) of the

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(1) 1969 A L J. 612.

(2) 1965 (2) S C R 718

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larly, under the industrial law, jurisdiction of the Labour and Industrial Tribunal to compel the employer to employ a worker, whom he does not desire to employ, is recognized. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act, the body has acted in breach of a mandatory obligation imposed by Statute, even if by making the declaration, the body is compelled to be something it does not desire to do.

The same view was reiterated in *Executive Committee of U P State Warehousing Corporation, Lucknow v. Chandra Kiran Tyagi* (1). After reviewing its earlier decisions and English cases, the Supreme Court laid down as follows:

"From the two decisions of this Court, referred to above, the position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognised exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Art. 311, (2) reinstatement of a dismissed worker under Industrial Law by Labour or Industrial Tribunals, (3) a statutory body when it has acted in breach of a mandatory obligation, imposed by statute"

In view of the aforesaid decisions of the Supreme Court, unless a case is covered by any of the three exceptions, there can be no enforcement of a contract of personal service. Now the question is whether the employees in the three cases come within any of three exceptions. Obviously, the first and the second excep-

(1) AIR 1970 SC. 1244.

tions have no application to the present case. It is only the third exception, which can be attracted.

Sri S N Kacker, appearing for the Management, contended that even the third exception has no application. His stand is that two conditions must be satisfied before the case can come within the four corners of the third exception. They are, firstly, that the body terminating the service must be a statutory body, and secondly, that the body must have acted in breach of a mandatory obligation imposed by the Statute. According to him, the body, in this case, is not a statutory one and, as such, the first requirement is lacking. In support of his contention, he strongly relied upon *S R Tewari v District Board, Agra* (1), *Executive Committee of U P State Warehousing Corporation, Lucknow v Chandra Kiran Tyagi* (2), and *Indian Airlines Corporation v Sukhdeo Rai* (3). I find great difficulty in accepting his contention. There may be cases in which the body is not a statutory one yet it is required under a statutory obligation to act in a particular manner. Such a case would, in my opinion, be also covered within the third exception.

In *Praga Tools Corporation v. C. V. Imanuel* (4) the Supreme Court laid down that the condition precedent for the issue of *mandamus*, is that there is one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of *mandamus* is in the form of a command, directed to a person, Corporation or an inferior Tribunal requiring him or them to do a particular thing therein specified which pertained to him or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority or whom the statutory duty

(1) AIR 1964 SC 1680

(3) AIR 1971 SC 1828

(2) AIR 1970 SC 1244

(4) AIR 1969 SC 1306

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is imposed need be a public official or an official body. If writ can be issued to a non-statutory body for the performance of a statutory duty *a fortiori* a suit for injunction would also lie.

Even assuming but not conceding that the body must be a statutory body, ASTHANA, J has held that the Managing Committee in question is a statutory body. He has given copious and weighty reasons for his finding with which I fully agree and it is not necessary to repeat those reasons over again here.

Sri Kacker next contended that the second requisite of the third exception is also lacking here. Namely, there is no statutory obligation on the Management to act in a particular manner. The obligation at the most, is a contractual one. In order to appreciate this point, it is necessary to read the relevant provisions of the relevant Act and the Statutes framed therein.

At the time of the appointment of the two teachers, the two colleges, namely, Vaish College, Shamli and Dayanand Vijendra Swarup Degree College, were affiliated to the Agra University. It is, therefore, the provision of the Agra University Act, which would be applicable to their cases, in spite of the subsequent affiliation of the said colleges to the Meerut University after the enforcement of the Meerut and Kanpur Universities Act. The first Statute of the two Universities was to be framed by the Government, as required by s 31 of the Meerut and Kanpur Universities Act. The Government, however, did not frame any Statute. The Meerut and Kanpur Universities Act, by its s. 50(1) (aa) authorised the Government to apply the Statutes or Ordinances made under the Agra University Act, 1926 with such adaptations and modifications, as it may deem necessary and expedient. The State Government by its notification dated 18th November, 1966, directed that



the Statutes and Ordinances of the Agra University, as amended up to date, shall apply to the Meerut University so long as the First Statute was not made under sub-s. (1) of s. 31. The result is that it is the Agra University Act and the Statutes framed therein, which would be relevant for the purposes of decision of the second appeal and the special appeal.

S. 25-C(1) of the Agra University Act provides:

"Every teacher in an affiliated college, not being a college maintained exclusively by Government, who is recruited after the commencement of the Agra University (Amendment) Act, 1953, shall be appointed under a written contract which will contain such terms and conditions as may be laid down by the Statutes"

Sub-s. (2) of s 25-C of the Agra University Act contemplates that:

"Every decision by the Management of an affiliated college, other than a college maintained by Government, to dismiss or remove from service a teacher shall be reported forthwith to the Vice-Chancellor and subject to provisions to be made by the Statutes shall not take effect until it has been approved by the Vice-Chancellor."

The conditions of service of the teachers of the affiliated colleges have been provided in Statutes 28 onwards. The Statute further prescribes a form of agreement with the Principal or Members of the staff other than the Principal in the Appendix attached to the Statute.

The point raised by Sri S. N. Kacker is that s 25-C of the Agra University Act is subject to the provisions made by the Statute and the Statute provides for a contract about the terms and conditions of the service. As the approval of the order of dismissal by the Vice-

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Chancellor has been incorporated in serial no. 13 of the terms of contract in the prescribed form, therefore, that also becomes a part of the contract and if there is a defiance of this condition, it is only a breach of the terms of the contract and not a breach of the Statute. The conditions of service, therefore, become a part and parcel of the agreement and not a matter of Statute. If, therefore, there is a defiance of s. 25-C(2) of the Agra University Act, it is only a breach of the terms of the contract of personal service and not a breach of the Statute.

It is true that s. 25-C(2) provides that the decision by the Management of an affiliated college to dismiss or remove from service a teacher shall be subject to the provisions to be made by the Statute. The decision by the Management will take effect subject to the provisions of the Statute only after the approval of the Vice-Chancellor. It is the decision of the Management which is subject to the Statute. The prescribed form of agreement appended to the Statute which is a part of the Statute, by cl. 12, provides that the Principal shall be acquainted, in writing with the grounds on which it is proposed to remove him and he shall be given enough time (not less than 15 days) to submit his explanation, which shall be duly considered by the Managing Committee before the decision of removal is taken. It further requires that the member shall also have a right to be personally present at the meeting of the Managing Committee to explain his case subject to the other requirements of the Statute. But on that account, it cannot be said that s. 25-C(2) of the Agra University Act itself is subject to the Statute. This would be clarified by a reference to s. 26 of the Agra University Act. S. 26, in so far as it is material for the purpose of this case reads:

"Subject to the provisions of this Act, the Statute may provide for any matter relating to the University and shall in particular provide for the following:—

There is no room for doubt that the Statutes are subject to the provisions of the Act and not *vice versa*. To interpret sub-s (2) of s 25-C of the Act differently would militate against the provisions of s 26 of the said Act. If s 25-C is not controlled by the Statute or the prescribed form of contract appended to the Statute, it will work independently of the agreement between the parties and merely because the requirement of s 25-C (2) has been also incorporated in Item no 13 of the prescribed form of agreement, it will not cease to have its operation as a law. S 25-C is not sub-servient to the Statute or the prescribed form of agreement attached to the Statute. It has its independent existence. If the law requires that the order of dismissal by the Management shall not take effect until it has been approved by the Vice-Chancellor, there would, in effect, be no order of dismissal or termination in the eye of law.

The contention of Sri S N Kacker, however, is that merely because certain restrictions have been imposed on the right of the parties, the contract, will not cease to be a contract. It would still remain a contract. The tendency of the Legislature, in recent years, has been to regulate the contract of the parties. Instances are not wanting where law has intervened and regulated the contract between the parties. Parties, therefore, cannot be allowed to contract themselves out of law. The mere fact that law has regulated the contract or put certain restrictions on the right of the parties to contract will not make the contract a Statute. It will still be a contract between the parties. The view

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taken by the Division Bench of this Court in *Managing Committee of Meerut College, Meerut v. Dr. V Puri* (1), that the agreement being the creature of the Act and the Statutes and, therefore, Statute 29-A and the agreement cannot be separated and, therefore, the agreement partakes the character of a Statute, in my opinion, is no longer a good law in view of the recent decision of the Supreme Court in *Indian Airlines Corporation v Sukhdev Rai* (2) and *Executive Committee of State Warehousing Corporation v. Chandra Kiran Tyagi* (3).

In *Indian Airlines Corporation v. Sukhdeo Rai* (2), it has been held that

“The fact, therefore, that the appellant Corporation was one set up under and was regulated by Act XXVII of 1953 would not take away, without anything more, the relationship between it and its employees from the category of purely master and servant relationship”

The mere fact that the terms of contract between the employer and the employee have been regulated by the Statute will not make the contract Statute. It will still remain a contract.

In *Executive Committee of U P State Warehousing Corporation, Lucknow v. Chandra Kiran Tyagi* (3) summing up the legal point, the Supreme Court observed as follows:

“From a review of the English decision, referred to above, the position emerges as follows:

“The law relating to master and servant is clear. A contract for personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repu-

(1) 1969, A L J 613

(2) AIR 1971 SC 1828.

(3) AIR 1970 SC 1244.

diation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. . . . But when a statutory status is given to an employee and there has been a violation of the provisions of the Statute while terminating the services of such an employee, the later will be eligible to get the relief of a declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of master terminating the services of a servant."

In the present case, however, there is something which entitles the teachers to get the relief of declaration from the Court, either by means of a suit or by means of a petition under Art. 226 of the Constitution. S. 25-C(2) of the Agra University Act enjoins that the order of dismissal or termination shall not be given effect to unless approved by the Vice-Chancellor. This provision entitles the teachers to get the relief of declaration, that they are in service, on account of the breach of law.

Sri Jagdish Swarup, appearing for the Management in Special Appeal no. 1516 of 1971, also contended that a writ can be issued to a statutory body performing statutory functions. While dealing with the contentions raised by Sri S. N. Kacker, I have already pointed out that a writ can be issued even to a non-statutory body provided it is under a legal obligation to act in a particular manner. He, however, contended that the teachers in the two cases had no status and, therefore, could be no declaration that they still continue to be teachers despite termination. He referred to *Corpus Juris Secundum*, Vol 81, p 1349, to explain the meaning of the term 'status'. The word 'status' has reference to, and means, the person's legal social relation

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and condition; the legal position of the individual in or with regard to the rest of the community; a person's condition arising out of legal station. Thus, as applied to a person 'status' means condition, such as being an infant, a slave, a married man or woman, a ward, or a prisoner, and it can be determined only by the state and not by agreement of the parties. So, the 'status' in common parlance is different from the status, as contemplated in law. It is conferred by law and not by an agreement.

Jurisprudence by George Whitecross Paton describes "status" as follows.

'Status' is a word which has no very precise connotation. Salmond gives four meanings.

(a) legal condition of any kind, whether personal or proprietary,

(b) personal legal condition, excluding proprietary relation,

(c) personal capacities and incapacities as opposed to other elements of personal status,

(d) compulsory as opposed to conventional legal position "

One of the best analysis is that of Allen. Status may be described as the fact or condition of membership of a group of which the powers are determined extrinsically by law, status affecting not merely one particular relationship, but being a condition affecting generally though in varying degree a member's claims and powers.

It is clear from the extracts from the standard text books that the status of a person is a creature of law and not of contract. In the instant case, it is true that the appointment of the teachers was by virtue of a contract between the employer and the employee, but

law has conferred status on the teachers. They have to perform certain duties required by the Act or the Statutes. This question has been dealt with by ASTHANA J. in the judgment prepared by him and I agree with him in holding that the teachers of the affiliated colleges, have status and, therefore, they can seek a declaration.

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There have been, however, two decisions of the Supreme Court *Prabhakar Ram Krishna Jodh v A L Pande* (1) and *Vidya Ram Misra v The Managing Committee, Shri Jai Narain College* (2). The teachers strongly relied on Jodh's case (1) to contend that s 25-C (2) and Statute 30 have the force of law while on behalf of the Management, reliance is placed on the ratio of *Vidya Ram Misra v The Managing Committee, Shri Jai Narain College* (2). Both the Supreme Court cases have been exhaustively dealt with by ASTHANA, J. in his judgment and I do not think I can usefully add anything in what has already been said by him.

In Writ Petition No 858 of 1970, the question was whether a writ petition is maintainable by an employee of the University, which is a statutory body, on the ground that his services had been terminated or he had been reduced in rank in violation of the provisions framed by the University. I have already held that if the order of termination is in breach of some Statute, a writ would lie. Now, the question arises whether the regulations framed by the Aligarh University have force of law or not. I entirely agree with ASTHANA, J. that the regulations have the force of Statutes.

(1) 1965 (2) S C R 713.

(2) A I R, 1972 S C 1450

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For the foregoing discussion, my conclusions are:

1. The view taken by the Division Bench of this Court in *Managing Committee of Meerut College, Meerut v. Dr. V. Puri* (1) is no longer a good law in so far as it rules that an agreement between the Managing Committee of a college and newly appointed teacher is entered into not because of the free will of the parties, but under the compulsive force of the Act and the Statute and the terms contained therein are not those voluntarily agreed to by the parties; but those which are prescribed. Such an agreement has the same force as the Act and the Statutes in view of the two latter decisions of the Supreme Court in *Executive Committee of State Warehousing Corporation v. Chandra Kiran Tyagi* (2) and *Indian Airlines Corporation v. Sukhdeo Rai* (3).

2. The civil court can grant a relief of injunction to an employee who had been dismissed or removed from service in breach of the Statute.

3. The writ petition is maintainable by an employee of an University, which is a statutory body, on the ground that his services had been terminated or he had been reduced in rank in violation of the provisions of the regulations framed by the University, if the regulations have the force of Statute.

T S MISRA, J :—I have had the benefit of reading the judgment prepared to be delivered by my brother ASTHANA, J. I agree with the conclusions reached by him. However, as serious arguments were raised at

(1) 1969 A.L.J. 612.

(2) A.I.R. 1970 S.C. 1244.

(3) A.I.R. 1971 S.C. 1828.



the Bar relating to the relationship of master and servant and the status of a teacher and a Principal of affiliated colleges governed by the provisions of the Kanpur and Meerut Universities Act, 1965, I would like to express my views with regard to the same. The various submissions made by the learned counsel for the parties have been set out in detail by brother ASTHANA J. in this judgment hence the same need not be stated here. Since the questions are of great public importance affecting a large number of teachers including Principals of affiliated colleges of the Universities concerned, it would be proper to examine in detail the provisions of law relating to the relationship of master and servant and the various decisions of the Supreme Court as well as the English decisions cited at the Bar.

S 21, cl (b) of the Specific Relief Act, no 1 of 1877, provided that a contract which is dependent on the personal qualifications or volition of the parties could not be specifically enforced. The aforesaid Act No 1 of 1877 was repealed by the Specific Relief Act, No 47 of 1963. However the provisions of the said s 21(b) were repeated in s 14(1) (b) of the Act No. 47 of 1963. From these provisions it is manifest that a contract of personal service cannot be specifically enforced. There are, however, certain exceptions to this rule as would be noticed later.

As far back as in 1948 the Privy Council in the case of the *High Commissioner for India v I M Lal* (1) made a declaration of a statutory invalidity of an act which a thing entirely different from enforcing a contract of personal service. The Supreme Court in the case of *Dr S Dutt v University of Delhi* (2) referred to *I M. Lal's case* (1) and observed that the Judicial

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(1) A.I.R. 1948 P.C. 121.

(2) A.I.R. 1958 S.C. 1080.

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Committee accepted the claim of I M Lal and made the declaration that his purported dismissal was void and inoperative and he remained a member of the service on the date of the institution of the suit and that the declaration did not enforce a contract of personal service but proceeded on the basis that the dismissal could only be effected in terms of the Statute and as that had not been done it was a nullity from which the result followed that I M Lal continued in service. In the case of *Dr S Dutt v University of Delhi* (1) the relevant facts were these. On 28th April, 1953 Dr Dutt wrote a letter to the University claiming under the provisions of the Delhi University Act an arbitration with regard to various disputes mentioned in it. He appointed professor M N Saha an arbitrator and asked the University to nominate another arbitrator. The University refused to do so whereupon Dr Dutt appointed Professor Saha the sole arbitrator who made his award on 17th June, 1953, *inter alia*, deciding that Dr Dutt was wrongfully dismissed, his dismissal was *ultra vires, mala fide* and had no effect on his status and that he continued to be a Professor of the University. At the request of Dr Dutt the award was filed in the court by the arbitrator. The University filed its objections. The objections were overruled and a decree in terms of the award was passed. On appeal the High Court set aside the award on the ground that it was not open to the arbitrator to grant Dr Dutt a declaration that he was a Professor in the University which no court could or would give him. The High Court felt that this declaration amounted to specific enforcement of a contract of personal service which was forbidden by s 21 of the Specific Relief Act and therefore, disclosed an error

(1) AIR 1958 SC 1050

on the face of the award The Supreme Court on appeal agreed with the view expressed by the High Court it held.

"There is no doubt that a contract of personal service cannot be specifically enforced S 21 cl. (b) of the Specific Relief Act, 1877, and the second illustration under this clause given in the section make it so clear that further elaboration of the point is not required It seems to us that the present award does purport to enforce a contract of personal service when it states that the dismissal of the appellant 'has no effect on his status' and 'He still continues to be a Professor of the University' When a decree is passed according to the award which if the award is unexceptionable, has to be done under s 17 of the Arbitration Act after it has been filed in Court that decree will direct that the award be carried out and hence direct that the appellant be treated as still in the service of the respondent It would then enforce a contract of personal service, for the appellant claimed to be a professor under a contract of personal service, and so offend S 21 (b)"

It was further held

"The award held that the appellant had been dismissed wrongfully and *mala fide* Now, it is not consequential to such a finding that the dismissal was of no effect, for a wrongful and *mala fide* dismissal is nonetheless an effective dismissal though it may give rise to a claim in damages The award, no doubt, also said that the dismissal of the appellant was *ultra vires* but as will be seen later, it did not thereby hold the act of dismissal to be nullity and therefore of no effect"

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In the case of *Barber v Manchester Hospital Board* (1) Barber having been dismissed without the prescribed procedure being followed it was held that despite the statutory flavour attaching to his contract it was an ordinary contract between master and servant

In the case of *Vidyodaya University v Silva* (2) a teacher appointed by the University was found not to be holding an office or status and though the University was established under a Statute it was under no statutory obligation or restriction subject to which only it could terminate the service of the teacher. The service of Silva was brought to an end by a resolution of the University Council set up under the statute establishing the University. Under s 18 (e) of the Act the Council had the power to dismiss an officer or a teacher on the grounds of incapacity or conduct which in the opinion of not less than two-thirds of the members of the Council rendered him unfit to be an officer or a teacher of the University, such a resolution with the requisite majority was passed. The Privy Council held that the mere circumstance that the University was established by the Statute and was regulated by statutory enactments contained in the Act did not mean that the contracts of employment made with teacher, though subject to s 18 (e), were other than ordinary contracts of master and servant, and therefore, the procedure of being heard invoked by the respondent was not available to him and no writ could be issued against the University. The test laid down in this case was whether the employer was under any statutory obligation or restriction subject to which only he could terminate the services of the employee.

In the case of *Ridge v Baldwin* (3) LORD REID observed that cases of dismissal fall into three classes,

(1) All ER 322

(2) 1964 (3) All ER 865  
 (3) 1964 AC 40

namely, (1) dismissal of a servant by his master (2) dismissal from office held during pleasure, and (3) dismissal from office where there must be something against a man to warrant his dismissal and added that in a case of purely master and servant relationship, the servant is not entitled to say that he was not heard by his master before his dismissal. A question of being heard or not could only arise where the authority employing the servant is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss them.

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In the case of *Life Insurance Corporation of India v. Mukherjee* (1) the Supreme Court held that s 11(2) of the Life Insurance Corporation Act, 1956 was paramount and would override any provisions of the Order passed by the Central Government if it was contrary to it. Next would come the Order and lastly the regulations which were subject to the Act and the Order and therefore, if the regulations were inconsistent with the provisions of s 11(2) or the said Order, the regulations would be to that extent invalid. Hence, even if the regulations provided for termination of services they would have to be read subject to the Order of the Government and consequently, the order terminating the service of an officer would have to be in consonance with the provisions of the said Order. Consequently, an Order terminating the services of an officer without giving him an opportunity of being heard, as provided by cl (10) of the said Order, would be without power, and therefore, invalid. The Supreme Court held that the impugned dismissal was invalid also for the reason that regulation 4(3) provided for determination of pay and allow

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ances and the fitment of officers in accordance with the principle laid down in the said circulars, and therefore, the service of an officer could not be determined under the guise of fitment. That could be done only under cl (10) of the Order and in accordance with the procedure laid down in that clause. Thus the order declaring the dismissal invalid was based on the ground that the regulations and the Order of the Central Government must be read harmoniously and when so read, the Central Government's order gave power to terminate the services of an officer after following the procedure there laid down and consequently the impugned dismissal made inconsistently with the provisions of the said Order was without jurisdiction and therefore, a nullity.

In the case of *S R Tiwari v District Board, Agra* (1) it was laid down that there were only three well recognised exceptions to the general rule under the law of master and servant where such a declaration would be issued, namely (1) cases of public servants falling under Art 311 (2) of the Constitution, (2) cases falling under the industrial law, and (3) cases where acts of statutory bodies are in breach of a mandatory obligation imposed by a Statute. It was held in *S R Tewari's* case (1) that his case did not fall under any of the said three exceptions. It was further held that the dismissal was wrongful inasmuch as it was in breach of the terms and conditions of employment embodied in the regulations and not in breach of a statutory restriction or obligation subject to which only the power to terminate the relationship depended. In *S R Tewari's* case (1) the decision of this Court in *Ram Babu Rathaur v Life Insurance Corporation* (2) was noticed with approval. In *Ram Babu Rathaur's* case (2)

(1) AIR 1964 SC 1680.

(2) AIR 1961 All 502.

this Court had held that though the Corporation was a statutory body, the relations between it and its employees were governed by contract and were of master and servant and not subject to any statutory obligation although the Corporation had framed under its power under the Act regulations containing conditions of service in the Corporation

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The case of *Prabhakar Ram Krishna Jodh v A L Pande* (1) was of a teacher in a college affiliated to the University of Saugar and managed by the governing body established under the provisions of the University of Saugar Act. Certain charges were framed against the appellant by the Principal of the College and he was asked to submit his explanation. He submitted his explanation denying all the charges and requested for particulars on which one of the charge was based. The particulars were not supplied and the governing body terminated his services without holding any enquiry. Jodh moved the High Court under Art 226 of the Constitution for a writ quashing the order of the governing body and for his reinstatement contending that the governing body had made the order in violation of the provisions of Ordinance 20, otherwise called the "College Code", framed under s 32 of the University of Saugar Act read with s 6(b) of that Act. The High Court held that the conditions of service of Jodh were not governed by the "College Code" but by the contract made between him and the governing body and therefore, dismissed the petition. On appeal to the Supreme Court it was held that the "College Code" had the force of law and that it not merely regulated the legal relationship between the affiliated colleges and the University but also

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conferred legal rights on the teachers of affiliated colleges. It was observed by the Supreme Court.

"It is true that cl 7 of the Ordinance provides that all teachers of affiliated colleges shall be appointed on a written contract in the form prescribed in Sch A but that does not mean that teachers have merely contractual remedy against the governing body of the college. On the other hand we are of opinion that the provisions of cl 8 of the Ordinance relating to security of the tenure of teachers are part and parcel of the teachers' service conditions."

Having held that the order of dismissal was passed in violation of cl 8 (vi) (a) of the "College Code" the appeal was allowed. In *Jodh's* case (1), however the fact that the Managing Committee was not a statutory body was not allowed to be raised before the Supreme Court on the ground that no such contention was raised in the High Court.

In the case of *Barot v S T Corporation* (2) the question whether the regulations constituted a statutory obligation subject to which only the power to terminate the employment could be exercised or not on the question whether they took the employment out of master and servant relationship was not canvassed.

In the case of *Rajasthan State Electricity Board v Mohan Lal* (3) the Supreme Court held that the Board set up under the Electricity (Supply) Act, 54 of 1948, was a 'State' within the meaning of Art 12 of the Constitution against which *mandamus* could issue under Art 226.

In the case of *Bank of Baroda v Mehrotra* (4) the Supreme Court reiterated the principles laid down in *S R Tewari's* case (5).

(1) 1965 (2) S C R 713

(2) AIR 1966 SC 1864

(3) AIR 1967 SC 1857

(4) 1970 (20) I L R 339

(5) AIR 1964 S.C. 1680



In the case *U P State Warehousing Corporation Ltd v Chandia Kisan Tyagi* (1) the facts disclosed that Tyagi was dismissed from service without following the procedure laid down in regulation 16 (3). The question which arose for determination in that case was whether a declaration to the effect that the termination was invalid and void on the ground of non-compliance of regulation 16(3), could be granted. The Supreme Court after examining a number of decisions, followed the decision in *S R Tewari v District Board, Agra* (2) and held that an order made in breach of regulation 16(3) was not in breach of any statutory obligation any that the relevant Act did not 'guarantee any statutory status to Tyagi' nor did it impose any obligation on the Warehousing Corporation in the matter of dismissal. Thus the ratio in this case was that violation of Regulation 16(3) was a breach of terms and conditions of relationship of master and servant and that master was liable for damages for wrongful dismissal.

In the case of *Indian Airlines Corporation v Sukhdeo Rai* (3) it was found that under ss 8(2) and 20 of the Air Corporation Act of 1953, the Indian Airlines Corporation was given the power to employ its own officers, and other employees to the extent it thought necessary on terms and conditions provided by the in regulations made under s 45. The regulations contained terms and conditions which governed the relationship between the Corporation and its employees. The Supreme Court held that the Regulations made under the power conferred by the Statute, merely embody the terms and conditions of service in the Corporation but they do not constitute a statutory restriction as to the kind of contracts which the Corpora-

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(1) AIR 1970 SC 1244.

(2) AIR 1964 SC 1680.

(3) AIR 1971 SC 1828

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tion can make with its servants or the grounds on which it can terminate them. That being so and the Corporation having undoubtedly the power to dismiss its employees, the dismissal of the employee concerned was with jurisdiction, and although, it was wrongful in the sense of its being in breach of the terms and conditions which governed the relationship between the Corporation and the respondent it did subsist. The case of that employee did not fall under any of the three well recognised exceptions, and therefore, he was only entitled to damages and not to the declaration that his dismissal was null and void. In para 4 of its judgment Supreme Court laid down .

"It is well settled principle that when there is a purported termination of a contract of service a declaration, that the contract of service still subsisted would not be made in the absence of special circumstances because of the principle that courts do not ordinarily grant specific performance of service. This is so even in cases where the authority appointing an employee was acting in exercise of statutory authority. The relationship between person appointed and the employer would in such cases be contractual, i.e. as between a master and servant and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined (See *A Francis v Municipal Councillors of Julla Lumpur* (1), and *Barbar v Manchester Regional Hospital Board* (2))"

It was further observed that "the power of the Corporation to terminate the employment of its officers and other employees was no where disputed, the only dispute raised was as to the manner in which it could be exercised. It is necessary to observe in this connection that neither the Act nor the rules made under

[1] (1962) 3 All E.R. 633.

[2] (1958) 1 All E.R. 322.

§ 44 by the Central Government lay down any obligation or restriction as to the power of the Corporation to terminate the employment of its employees or any procedural safeguards, subject to which only, such power could be exercised" The employment of Sukhdeo Rai not being one to an office or status and there being no obligation or restriction in the Act or the rules subject to which only the power to terminate his employment could be exercised, it was held that he was not entitled to the declaration that the order of dismissal was null and void and that he continued to be in service

*In the case of Regina v St A H E School* (1) Km Regina was working as a Head Mistress She was served with certain charges The reply given by her was found to be unsatisfactory and the Management by an order passed on 1st June, 1955 reduced her to the position of an assistant teacher Her appeal before the District Educational Officer was rejected She further appealed before the Divisional Inspector of Schools and succeeded The Management was directed to restore her original position as Head Mistress The Management declined to do so whereupon she filed the suit which was ultimately carried to the Supreme Court on appeal The Supreme Court found that Part II of the Rules which dealt with recognition could not be said to be statutory rules framed under the Madras Elementary Education Act, 1920, although the power to make such rules was still retained with the Government by reason of cl (h) being still there in s 56(2) The Supreme Court observed that ordinarily the relations between the Management of an elementary school and the teachers employed in it would be governed by the terms of the contract of employment and the law of master and servant in the absence of any statute controlling or abrogating such a

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(1) AIR 1971 S.C. 1920.

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contract of employment and providing to the contrary. The mere fact that such a school had obtained recognition and aid from the education department would not mean that the relationship between the Management and its employees had ceased to be governed by the contracts of employment under which the employees were recruited and by the law of master and servant unless there was some provision in the Act overriding the law as one finds in statutes dealing with industrial disputes and similar other matters. There was in fact no such provision in the Madras Elementary Education (Amendment) Act. The result was that the relations between the management and the teachers even in recognised elementary schools had to be regarded as being governed by the contracts of employment and the terms and conditions contained therein. Part II Rules, which could not be regarded as having the status of statutory rules made under s 56 could not be said to have the effect of controlling the relations between the management of the schools and its teacher or the terms and conditions of employment of such teachers or abrogating the law of master and servant which ordinarily could govern those relations. In the absence of any such provision in the Act and the Rules not being statutory rules *Km Regina* could not be said to have had a cause of action for enforcing the directions given by the Divisional Inspector to restore her as the Head Mistress in the appeal filed by her. The Supreme Court further held that if the rules lay down conditions the Government could insist that satisfaction of such conditions would be condition precedent to obtaining recognition and aid and that a breach or non-compliance of such conditions would entail either the denial or withdrawal of recognition and aid. The management of a school, therefore, would commit a breach or non-compliance of the condi

tions laid down in the rules on pain of deprivation of recognition and aid. The rules thus govern the terms on which the Government would grant recognition and aid and the Government can enforce these rules upon the management. But the enforcement of such rules is a matter between the Government and the management and a third party, such as a teacher aggrieved by an order of the Management, cannot derive from the rules any enforceable right against the management on the ground of a breach or non-compliance of any of the rules.

In the case of *Vidya Ram v S J. N. College* (1) the Supreme Court again examined the various decisions relating to the law of master and servant. Vidya Ram Misra was the Head of the department of Zoology in Jai Narain College, Lucknow, which is an associate college of the Lucknow University. Charges were framed against him and his explanation was called for. He submitted an explanation which was not found to be satisfactory and the Management Committee passed a resolution for his removal from service. This resolution was challenged by Vidya Ram Misra in a writ petition. A learned single Judge of this Court having found that the Managing Committee in terminating the services acted in violation of the principles of natural justice quashed the resolution. On appeal a Division Bench of this Court found that the relationship between the College and Vidya Ram Misra was that of master and servant and that even if his services had been terminated in breach of the *audi alteram partem* rule of natural justice the remedy was to file a suit for damages and not apply under Art. 226 of the Constitution for a writ. Vidya Ram Misra preferred an appeal before the Supreme Court by special leave. The Supreme Court observed:

(1) AIR 1972 S.C. 1450.

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"It is well settled that, when there is a purported termination of a contract of service, a declaration that the contract of service still subsisted would not be made in the absence of special circumstances, because of the principle that Courts do not ordinarily enforce specific performance of contracts of service. If the master rightfully ends the contract, there can be no complaint. If the master wrongfully ends the contract, then servant can pursue a claim for damages. So even if the master wrongfully dismisses the servant in breach of the contract, the employment is effectively terminated."

The Supreme Court re-affirmed the exceptions formulated in *S R Tewari's* case (1) to the general rule that when there is a termination of a contract of service, a declaration that the contract of service still subsisted would not be made by saying

"But this rule is subject to certain well recognised exceptions. It is open to the courts, in an appropriate case, to declare that a public servant who is dismissed from service in contravention of Art. 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly, under the industrial law, jurisdiction of the labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognised. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act, the body has acted in breach of a mandatory obligation imposed by the statute, even if by making the declaration the body is compelled to do something which it does not desire to do."

(1) AIR 1964 SC 1680.

Statute 151 framed under the provisions of the Lucknow University Act provides that teachers of an associated college including the Principal shall be appointed on written contract and that the contract shall *inter alia*, provide the conditions mentioned therein in addition to such other conditions not inconsistent with the Act and the Statutes as an Associate College may include in its own form of agreement. The statute specifies the grounds on which a teacher's services can be terminated. Statute 152 stipulates that the form of agreement to be adopted by each college shall be approved by the Executive Council before it is put in force. Statute 153 provides for a form of agreement which shall serve as a model. Thus Statute 151 did not provide for any particular procedure for dismissal or removal of a teacher for being incorporated in the contract. Nor does the model of contract lay down any particular procedure for that purpose. Cl (5) of the agreement executed by Vidya Ram, however, provided that procedure. The Supreme Court in these circumstances held that Statute 151 only provided that the terms and conditions mentioned therein must be incorporated in the contract to be entered into between the College and the teacher. It did not say that these terms and conditions had any legal force, until and unless they are embodied in an agreement. To put it in other words, the terms and conditions of service mentioned in Statute 151 had *proprio vigore* no force of law. They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract, they had no vitality and can confer no legal rights. Therefore Vidya Ram could not find any cause of action of the breach of any law but only the breach of the contract. It was further held that in order that the third exception to the

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general rule that no writ will lie to quash an order terminating a contract of service, albeit illegally, might apply, it is necessary that the order must be the order of a statutory body acting in breach of a mandatory obligation imposed by a statute. It was held that the Managing Committee in question was not a statutory body and so the case of *Vidya Ram* did not fall under the third exception.

The Supreme Court has recently again examined the law of master and servant in the case of *Sirsi Municipality v Caeelia Kok Francis Tellis* (1) and observed

“The cases of dismissal of servant fall under three broad heads. The first head relates to relationship of master and servant governed purely by contract of employment. Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contracts of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal services. Such a declaration is not permissible under the law of Specific Relief Act.

The second type of cases of master and servant arises under Industrial Law. Under that branch of law a servant who is wrongfully dismissed may be reinstated. This is a special provision under Industrial Law. This relief is a departure from

(1) 1978 (1) S.C.C. 409.



the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.

The third category of cases of master and servant arises in regard to the servant in the employment of the State or of other public or local authorities or bodies created under statute

Termination or dismissal of what is described as a pure contract of master and servant is not declared to be nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages. In the case of servant of the State or of local authorities or statutory bodies, courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the Statute. Apart from the intervention of statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies.

The courts keep the State and the public authorities within the limits of their statutory powers. Where a State or a public authority dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the Courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is thus distinguished from private employment in pure cases of master and servant."

The Supreme Court also considered in this case the question of "statutory status" of an employee and observed that the cases of a "statutory status" of an

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employee can also form the subject-matter of protection of the rights of an employee under the statute. The statutory scheme of employment in this case of *Vine v National Dock Labour Board* (1), was held to confer on the worker a status and an unlawful act of the Board was found to be interference with status. The status of the dock worker was recognised by the Supreme Court in the case of *Calcutta Dock Labour Board v Jaffar Imam* (2) and the termination of the employment in breach of cl 36 (3) of the scheme made by the Central Government in exercise of the power conferred on it by s 4 (1) of the Dock Workers (Regulation of Employment) Act, 1948 was held to be bad.

In *Sirsi Municipality* case (3) it was found that dismissal was in violation of r 143 which imposed a mandatory obligation. The rules were made in exercise of the power conferred on the municipality by statute and were binding on the municipality. The dismissal was, therefore, held to be *ultra vires*.

The result of the enquiry into the various cases may be stated as follows

(1) The cases of dismissal of servant fall under three broad heads, (i) cases of master and servant governed purely by contract of employment, (ii) cases of master and servant arising under industrial law, and (iii) cases of servants in the employment of the State or other public or local body or authority created under the statute.

(2) When there is a purported termination of a contract of personal service, a declaration that the contract of service still subsisted would not be made nor would the dismissal or termination in such a case be declared a nullity however

1) 1956 (3) All E R 939

(2) AIR 1966 SC 282

(3) 1973 (1) SCC 409.

wrongful or illegal it may be. The remedy of an employee in such an event will only sound in damages. A declaration of unlawful termination and restoration to service in such a case of contract of employment amounts to enforcement of contract of personal service and is not permissible under the provisions of the Specific Relief Act.

(3) In the cases governed by the Industrial law a servant who is wrongfully dismissed may be reinstated.

(4) In the case of servants in the employment of the State or other public or local bodies or authorities created under the statute courts may in appropriate cases declare a dismissal to be void if the dismissal is contrary to rules of natural justice or is in violation of the provisions of the statute or rules having the force of law or some provisions of the Constitution.

(5) There are thus three recognised exceptions to the general rule under the law of master and servant where a declaration that the determination of the employment is void and *ultra vires* may be made, namely, (i) cases of public servants falling under Art 311(2) of the Constitution, (ii) cases falling under the Industrial law, (iii) cases where acts of statutory bodies or public authorities are in breach of a *mandatory* obligation or restriction imposed by a statute.

(6) Where the provisions of an Act or statute relating to security of tenure of an employee are part and parcel of conditions of service apart from the terms and conditions stipulated in the written contract and such provisions have statutory force the order of termination of service passed in violation thereof may be challenged in an appropriate proceeding. In all such cases the acid test is whether

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ther an employer is under any statutory obligation or restriction subject to which alone he can terminate the services of the employee

(7) The dismissal of a servant by statutory including local authorities or bodies in breach of the provisions of the statutes or order or schemes made under the statute which regulate the exercise of the power is invalid or *ultra vires* and the principle of pure master and servant contractual relationship has no application to such cases.

(8) If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition. In other words if the cause of action is based not on the breach of a mandatory obligation imposed by a statute but only on the breach of contract the remedy is only by way of a suit for damages and not by way of an application under Art 226 of the Constitution

The next question relates to the 'status' of a teacher or principal of affiliated colleges in question. It was contended on behalf of the management that there was nothing in the nature of status which was capable of protection hence a teacher or a principal of an affiliated college governed by the provisions of the Kanpur and Meerut Universities Act cannot seek a declaration that the order of dismissal is void and *ultra vires*. The submission was that the relationship between a teacher and the management is a pure relationship of master and servant governed by the terms of contract, hence even if the order of dismissal is found to be illegal his remedy would only sound in damages. In order to appreciate this contention raised on behalf of the management it is necessary to understand the meaning of the term 'status' as operative in the field of law.

In *Corpus Juris Secundum*, Vol LXXXI, p 1349 the word 'status' has been defined. It reads:

"The word 'status' defined generally, means standing, state or condition

As applied to a person, 'status' has reference to, and means, the person's legal relation and condition, the legal position of the individual in or with regard to the rest of the community, a person's condition arising out of a legal station. Thus, as applied to a person, 'status' means condition, such as being an infant, a slave, a married man or woman, a ward, or a prisoner, and it can be determined only by the state and not by agreement of the parties

Status, as applied to a person, is frequently a conflict of laws problem "

The word 'status' has also been defined in English Conflict of Laws by Schmitthoff Chap XI of that book deals with the status of a person. Relying on the definition of the term 'status' given in the *American Restatement* para 119 the learned author states:

"A 'status' means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third parties and the state are concerned

The legal characteristic of status is, then that it is generally not temporary nor terminable at will. In this respect, status is unlike contract. A contract of service or of partnership may be limited in time and terminable at the will of one or more of the parties thereto, but the status of marriage is contemplated as permanent and can be dissolved only by the State."

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LORD HALDANE in *Salvesen v. Administrator of Austrian Property* (1), while considering the 'status' of marriage said:

"For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognises as having been superadded to it by the authority of the State"

BRETT, L. J., in *Niboyet v Niboyet* (2) said that:

"The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community . As that relation and status are imposed by law, the only law which can impose or define such a relation or status (i.e. relative position) so as to bind an individual, is the law to which such individual is subject"

In the case of *Luck Walker v Luck* (3) it was observed:

"Status is in every case the creature of substantive law. It is not created by contract, although it may arise out of contract, as in the case of marriage, where the contract serves as the occasion for the law of the country of the husband's domicile to fix the married status of the parties to the contract. Perhaps the most far-reaching characteristic of status, and most material to the decision of the present case, is its quality of universality, both in the general jurisprudence of other nations and in private international law"

(1) 1927 A.C. 841 at 658

(3) 1940 (3) All. E.R. 807

(2) (1878) L.R. 4 P.D. 1, 11

Before the nineteenth century, the term "status" had not received complete recognition as a separate judicial conception. In 1834, Story on Conflict of Laws, 1st Edn said:

"The subject has never been systematically treated by writers on the common law of England, and indeed, seems to be of very modern growth in that kingdom; and can hardly, as yet, be deemed to be more cultivated"

The judgments of the first half of the nineteenth century disclose that status is the effect of domicile. There seemed to be occasional conflict between domicile and nationality. Napoleonic Code placed reliance on nationality. Universality was the basic principle of status in private international law but it was a difficult problem in private international law.

In the case of *Roshan Lal v. Union of India* (1) the Supreme Court observed:

"The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Art 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Art. 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely

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(1) A.I.R., 1967 S.C. 1889 at 1894

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contractual relationship vountarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by *Salmond* and *Williams* on Contracts (2nd Edition, p 12) as follows

“So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligation defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to have matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status.”

In my view, maintainence of social institutions and orderly relationship between different individuals and



groups within the State are the principal objects of the juristic concept of status. This concept goes on reshaping being affected by economic and political philosophies and new sociological schools of jurisprudence. On the establishment of a classless society the word 'status' would acquire a completely different connotation. Even in a welfare State pledged to provide greatest good to the greatest number the concept of status has received a new meaning. It is now linked with the relationship of labour with capital. A workman has a definite and recognised status. So do have all those persons who contribute their energy and labour to production and to various developmental and nation-building activities set up for the welfare of the society. A teacher has had a status. He has always been held in high esteem and reverence by his disciples and students. Society has always given him a place of honour. From ages past a day has been fixed in this country called as "Guru Purnima" when a student goes to his Guru to pay his respects. Even in modern times fifth day of September every year is a teachers' day in our country. The tendency in modern legislation seems to be to recognise the status of a teacher as understood in the field of law. Teachers of the affiliated colleges governed by the provisions of Agra University Act and Kanpur and Meerut Universities Act, with which I am concerned in these cases at hand have, in my opinion, a status. The legal relationship between them and the management is something in the nature of status. The transaction of their appointment with affiliated colleges results in the creation not only of obligations defined by the parties but also and concurrently of obligations defined by the aforesaid enactments and the Statutes framed thereunder.

The management of an affiliated college may appoint a person as a teacher and for that purpose both the

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parties have to execute a written contract as required by the said Acts but the appointment is subject to the approval of the Vice-Chancellor. If the Vice-Chancellor disapproves of the appointment the services of the teacher will have to be terminated. Similarly the termination or removal from service is also subject to the order of the Vice-Chancellor in that behalf. The resolution of the management of an affiliated college to terminate the services of a teacher is not effective until and unless it is approved of by the Vice-Chancellor of the University. The matter, therefore, is not confined to the realm of contract only. It is not an employment depending merely on the terms of the contract. It is much more than a purely contractual relationship. The law, as pointed out above, imposes certain conditions which are essential to not only bringing into effect the appointment but also bringing into effect the termination of service. The powers and duties are thus determined by law as well. The relationship in the case of a teacher of an affiliated college governed by the said Acts may arise out of contract but the contract serves as an occasion for the law to fix the status of the teacher. The law in the case of teachers of such an affiliated college attaches to the relationship compulsory incidents such as approval of the Vice-Chancellor to the proposed dismissal as also the liability to pay provident fund etc. Statute 29 contained in Chap. XVIII leaves certain matters within the domain of contract but they are by law required to be necessarily incorporated in the contract governing the terms and conditions, which as mentioned in Statute 29, can also not be unilaterally altered. They are also fixed by the law. At the same time the conditions mentioned in Statute 30 which is independent of Statute 29 relates to matters depending on considerations of public policy to guarantee security of service. Of course, in a case of ordinary contract of service between

a master and servant where the powers and duties are not determined by law but by agreement between the parties concerned it may be said that the relationship is merely contractual

A Principal of an affiliated college governed by the provisions of the aforesaid Acts having prescribed qualifications is a member of the Senate and the Court of the University. See s 17(1)(4) of the Agra University Act, s 18(1)(5) of the Kanpur and Meerut Universities Act. He has certain statutory duties to perform. He is responsible for the maintenance of discipline in the college (s 33 of the Kanpur and Meerut Universities Act). He has a right of representation on University bodies and of being appointed as examiner. [See Chap I, Statute 5(1)(2)(9) of the Agra University Statutes.] Chap XVIII of the Agra University Statutes prescribes the qualifications of a Principal and also his grade and salary. He is an *ex officio* member of the managing committee. He is entitled to the benefits of provident fund and to certain leave. He is a member of the selection committee for the appointment of teachers. He has to certify to the University regarding the fulfilment of conditions of affiliation. The disputes about seniority of teachers are first to be decided by the Principal. He is also a member of the Finance Committee. Boys' fund is administered by him. A student can be admitted only when a Principal accepts his application. He has a power of punishing the students by placing them under suspension, imposing fine or passing an order of rustication. He has to send a list of the students admitted to the College to the Registrar. All applications for examination are sent through him. The refund of fee is to be granted by him. He has power to detain students from appearing at the examination and condone attendance in college and National Cadet Corps. The duties of a Principal are thus fixed by law and in

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the enforcement of these duties society has an interest. The fate of thousands of students hangs on the manner of the performance of those duties. A lapse on the part of the management or the Principal or even a teacher may result in the disaffiliation of the college ultimately affecting the student community which is always a future hope of the country.

The learned counsel appearing for the management referred me to *Vidya Ram's* case (1) in which it was observed that in that case there was no element of public employment, nothing in the nature of an office or status which is capable of protection. That case is, however, distinguishable. *Vidya Ram's* appointment was held to be purely contractual. The relevant regulations framed under the Lucknow University Act relating to the terms and conditions of service were held to be not having any force and vitality of their own unless they were incorporated in a deed of agreement. It was observed that without the contract they have no vitality and can confer no legal rights. This is not so in the cases of appointments of a teacher and a Principal made under the Agra University Act and Kanpur and Meerut Universities Act and the statutes framed under those Acts. In view of the legal position discussed above I am of the view that a teacher including the Principal of an affiliated college whose terms of service are governed by the Agra University Act and Kanpur and Meerut Universities Act have status which is capable of protection.

Examining the cases at hand in the light of the legal position discussed above I would agree with the conclusions arrived at by the brother ASTHANA, J. However, I do not find it necessary to make a detailed examination of those cases as also of the submissions made by the learned counsel for the parties inasmuch as the same has been done by brother ASTHANA, J. and I agree with his answers to the questions posed.

(1) AIR 1972 SC 1450.

## ORDER BY THE COURT

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*Second Appeal no 2973 of 1971*

We hold that the plaintiff-respondent Sri Laxmi Narain is entitled to the relief claimed in the plaint on the facts and circumstances of the case

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The second appeal may now be listed before the learned single Judge for further hearing on any point surviving and for decision in accordance with law.

*Special Appeal no 516 of 1971.*

We hold that the petitioner Sri Suresh Chandra Sharma is entitled to the appropriate relief in the writ petition which is maintainable if the Special Appeal Bench affirms the factual findings recorded by the learned single Judge

The special appeal may now be listed before the Bench concerned for further hearing and decision in accordance with law.

*Writ Petition no 858 of 1970.*

The question referred is answered in the affirmative. The writ petition is maintainable. The petition may now be listed before the learned single Judge for decision in accordance with law.

*Writ Petition no 68 of 1971.*

As the learned counsel for the parties had stated that they did not want any decision from the Court in this petition, it would be listed before the learned single Judge to be decided in accordance with law and in the light of the Full Bench decision in the above connected cases

*Ordered accordingly.*

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## CIVIL MISCELLANEOUS

Before Mr. Justice S Chandra and Mr Justice K N  
Seth

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ANOTHER

PETITIONERS,

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STATE OF U P AND OTHERS RESPONDENTS

**Industrial Disputes Act, 1947, s 2-A—Individual dispute relating to workman—Industrial dispute—S 2-A—Validity of**

Conferment of legislative power with respect of industrial disputes included the power to legislate on individual disputes S 2-A was within the legislative competence of Parliament

Writ Petition no 8782 of 1971 connected with Writ Petitions nos 6320, 6322 to 6326, 6586, 6587, 6699 of 1971 and 1907, 1911 and 2156 of 1972

*Bharati Agarwal*, for the Petitioners

S C, for the Opposite-parties

S CHANDRA, J. —One of the questions raised in this group of cases was that s 2-A of the Central Industrial Disputes Act, 1947, was constitutionally *ultra vires*. Considering the importance of this question, a learned single Judge referred these cases to a larger Bench for deciding this question. Learned counsel appearing for the parties confined their arguments to the validity of s. 2-A. We shall hence deal with only that question.

S. 2(k) of the Industrial Disputes Act, 1947, defined an industrial dispute. In *C. P. Transport Service v. Raghunath* (1) it was observed that decided cases in India disclosed 3 different views as to the meaning of 'industrial dispute' (1) a dispute between an employer and a single workman is not an industrial dispute, (2) it can be an industrial dispute; and (3) it cannot *per se* be an industrial dispute, but may become one if it is taken up by the Union or a number of workmen. The

(1) A.I.R. 1957 S.C. 104.

Supreme Court observed that the preponderance of judicial opinion is clearly in favour of the last of the three views. Notwithstanding that the language of s. 2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of adjudication under the Act, when the same had not been taken up by the Union or a number of workmen. This view was re-affirmed by the Supreme Court in the case of *Newspapers Ltd v State Industrial Tribunal* (1). The Court observed that this view is in consonance with the basic idea underlying modern industrial legislation. The interpretation given to the corresponding phrase "trade dispute" in English law and "Industrial dispute" in Australian Law also accords with this view and in the absence of an express provision to the contrary or necessary intendment there is no reason to give a different interpretation to the expression in the Indian statute.

In view of this state of judicial opinion, Parliament by the Amending Act no 35 of 1965 added s 2-A to the Industrial Disputes Act. It provided.

"2-A *Dismissal, etc of an individual workman to be deemed to be an industrial dispute—*

Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no

(1) AIR. 1957 S.C 582

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other workman nor any union of workmen is a party to the dispute"

Under this provision, individual disputes relating to termination of the services of an individual workman have been made an industrial dispute

Mr *Khare* appearing for the petitioners challenged the vires of s 2-A on the following grounds.

(1) The concept of industrial dispute had become well settled when the Government of India Act, 1935, was enacted. The power to legislate in respect of industrial disputes was confined to collective disputes. The Constitution of India conferred power on Parliament to legislate with regard to industrial disputes. Parliament hence was not competent to enlarge the concept of industrial disputes so as to include individual disputes in it.

(2) In view of Entries 22, 23 and 24 of List III of the Seventh Schedule to the Constitution, Parliament could not make an individual dispute an industrial dispute without enacting substantive law therefor.

(3) Since the U. P Industrial Disputes Act covered the whole field of industrial disputes, s 2-A of the Central Act was not operative in this State.

(4) S 2-A violated Art 14 of the Constitution because it did not lay down any policy or standard to guide the discretion of the State Government in referring industrial disputes.

The relevant entries in the Government of India Act, 1935, and the Constitution in relation to industrial disputes are:

<i>Government of India Act</i>		<i>Constitution</i>
List III, Entry 29	...	List III, Entry 22
List III, Entry 26	...	List III, Entry 23
List III, Entry 27	...	List III, Entry 24



Entry 29 and Entry 22 both were "trade unions; industrial and labour disputes". Entry 26 was "Factories" Entry 27 was "Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions, old age pensions".

The submission was that since the Government of India Act, 1935, was enacted by the British Parliament, the power given by it to the Indian Legislature to make laws in respect of industrial and labour disputes must be confined to what was in England considered to be the concept of industrial disputes. So far, there may not be any quarrel. The argument, however, proceeded that in England the corresponding term was "trade dispute" and the English Courts consistently held that trade disputes referred to collective disputes and did not include industrial disputes. Similar was the position in Australia.

In the first place, if the British Parliament had intended to confer legislative power upon the Indian Legislature in respect of what was then known as "trade disputes", it would have used the phrase "trade disputes" in Entry 29 of List III rather than an unknown term in England namely "industrial and labour disputes". Assuming, however, that the term "industrial and labour disputes" was intended to refer to the corresponding English term "trade dispute", let us examine the concept of "trade dispute" as obtaining in England.

Trade disputes were not the subject-matter of the common law of England.

The British Parliament enacted the conspiracy and Protection of Property Act, 1875, which was followed by the Trades Disputes Act, 1906, and the Industrial Courts Act, 1919. All these enactments defined the term "trade dispute" in identical language with a minor

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change in punctuation These enactments were followed by the Conditions of Employment and National Arbitration Order, 1940, which was made under regulation 58-AA of the Defence (General) Regulations, 1939, and, the Industrial Disputes Order, 1951

The definition of the term "trade dispute" as occurring in the 1940 Order and the 1951 Order came up for consideration in *Rev v National Arbitration Tribunal* (1) In that case a dispute between a town clerk and the Municipal Corporation was referred to the National Arbitration Tribunal under the 1940 Order The reference was proceeded with by the Industrial Disputes Tribunal which superseded the earlier Tribunal under the Industrial Disputes Order, 1951 The Municipal Corporation took the matter to the King's Bench Division for an order prohibiting the Tribunal from proceeding with the case on the ground that the referred dispute was between a single workman and the employer and it was outside the purview of the trade disputes referred to in the Order of 1940 and of 1951 and so the Tribunal had no jurisdiction Construing the provisions of the 1940 Order, LORD GODDARD, C J speaking for the Court held that the definition of the term "trade dispute" therein read with s. 1(1) of the Interpretation Act of 1889 (which provided that unless the contrary intention appears, words in the singular shall include the plural and words in the plural shall include the singular) established that an individual dispute was included in it He observed:

"It cannot, we think, be contended that the wording of the Order of 1940 indicates any intention to exclude the application of the words of s. 1(1) of the Interpretation Act set out above We therefore conclude that a dispute between one employer and one workman was within the Order

(1) (1951) 2 All E R 828

of 1940 and in this respect some reliance was placed on the opinion of LORD ATKINSON in *Conway v Wade* (1), where he said—

‘In order that a dispute may be a trade dispute at all, a workman must be a party to it on each side, or a workman on one side and an employer on the other’

HIS Lordship was there considering a matter arising under the Trade Disputes Act, 1906, in which the definition of trade dispute is in the same words as in the order although the punctuation is different. In fact, in the Industrial Courts Act, 1919, the definition of trade dispute is in the same words as in the Act of 1906, and in that the punctuation is the same as in the order we are now considering.

In our opinion this question whether the references were validly made under the order of 1940 is not to be determined by any nice question as to the presence or absence of a comma but we think that the application of the Interpretation Act, 1889, concludes the matter. In our opinion, therefore, there was power, when the references were made to refer the dispute, which was a dispute between an employer and a workman, to the tribunal and the tribunal had authority to deal with it.”

The Order of 1940 was, however, revoked on 1st August, 1951 by the Industrial Disputes Order, 1951. Considering the various provisions of the 1951 Order the learned Chief Justice came to the conclusion that an individual dispute was not a trade dispute within meaning of the 1951 Order. It was observed that the whole tenor of the Order of 1951, and the fact that throughout the Order the word ‘employer’ in the singular is used in conjunction with the word “workers” in the plural, indicates an intention that these words should be interpreted literally and in consequence that s 1(1) of the Interpretation Act, 1889, should not apply

(1) 1909 A.C. 506 at 517.

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This decision brings out the position that the term "trade dispute" did not have any uniform or well settled concept in England. Its meaning and connotation depended upon its definition in the statutory enactments considered in the light of the scheme of the particular statute read as a whole. It is equally evident that at least the Conditions of Employment and National Arbitration Order, 1940 which remained in operation for more than 10 years, included individual dispute to be a trade dispute under it.

S 51 of the Australian Constitution gave legislative power in sub-s XXXV, with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The term "industrial disputes" was considered by the High Court of Australia in the context of the entry to be confined to collective disputes. In the *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1) ISAACS, J observed (p 375)

"The dispute in the industry generally, which is an industrial dispute in the large economic sense, must be carefully distinguished from an individual dispute between a specific single employer and one of his employees. The latter may be an industrial dispute too but in a narrower sense, and not in the broad national sense which the Constitution intended."

The term "industrial dispute" was construed in its broad sense in Australia in the context of the constitutional provisions there. The constitutional provisions in our country are entirely different. The Government of India Act, 1935, or the Constitution of India was not based on the Australian Constitution. The Australian decisions, therefore, cannot be utilised to establish that the term "industrial dispute" had acquir-

ed a well settled meaning by 1935 when the Government of India Act was enacted

The Supreme Court decisions in the cases of *C. P. Transport Services Limited* (1) and the *Newspapers Limited* (2) show that the term "industrial dispute" as occurring in the Industrial Disputes Act, 1947, was construed to exclude individual disputes because of the scheme of the Act. It was not even whispered that the Legislature was incompetent to legislate with regard to individual disputes under the Entry

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In our opinion, the legislative history relating to industrial and labour disputes shows that the term "industrial dispute" included individual disputes also in its narrower sense in England, Australia as well as this country. Conferment of legislative power with respect of industrial disputes included the power to legislate on individual disputes. S 2-A was within the legislative competence of Parliament.

In the next place, Mr *Khare* urged that legislation with regard to individual disputes for the first time could be operative and efficacious only if Parliament had along with s. 2-A enacted substantive law in relation to individual disputes. The Industrial Disputes Act contained various substantive provisions with regard to reference and resolution of industrial disputes. There was no necessity for Parliament to enact the same provisions all over again, for making an individual dispute of the kind mentioned in s. 2-A, an industrial dispute. Various provisions of the Industrial Disputes Act all become applicable to individual disputes. We see no infirmity in s. 2-A on this ground.

The next submission was that since the field of industrial dispute was fully covered by the U P Industrial Disputes Act, s. 2-A of the Central Act could not operate in this State. S. 12 of the U P. Act provides:

(1) A.I.R. 1957 S.C. 104.

(2) A.I.R. 1957 S.C. 592.

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"Unless any order made under this Act makes express provision to the contrary, nothing in this Act shall affect the power of the State Government to refer any industrial dispute or matters connected therewith under the Industrial Disputes Act, 1947 or to deal with any report or settlement in accordance with the provisions of that Act."

Thus, the U. P. Act expressly confers power upon the State Government to make references under the Central Act. With regard to such references s 2-A of the Central Act would clearly be applicable. In the present group of cases references have been made under the Central Act.

The subject-matter of industrial dispute being in the Concurrent List, the proviso to Art 254(2) of the Constitution is attracted. Under it, nothing in Art. 254(2) could prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law made by the Legislature of the State. The U. P. State Legislature had enacted the Industrial Disputes Act in 1947. Parliament could thereafter make any law with respect to the same subject-matter, namely industrial disputes. Consequently, s 2-A having been added in 1965, was saved by the proviso aforesaid; and would operate even in this State.

The last submission of the learned counsel was that s 2-A was violative of Art 14 of the Constitution because it did not lay down any policy or standard for guiding the State Government for choosing individual cases for reference. S 2-A does not deal with the power of the Government to refer a particular case to adjudication. Upon the ground urged by learned counsel the sections of the Act conferring power upon the State Government to refer individual cases for adjudication may be hit by

Art. 14, but that was not the argument before us On the ground urged by learned counsel, s 2-A could not possibly be held to be violative of Art 14 of the Constitution.

In *P Janardhana v. Union of India* (1); *Toshniwal Bros. (P.) Ltd v Presiding Officer, Labour Court* (2), and *T V. S. Iyengar & Sons v. State* (3) the validity of s. 2-A was upheld. In *Jute and Jute Goods Buffer Stock Association v. Second Industrial Tribunal, West Bengal* (4) a single Judge of the Calcutta High Court held that s. 2-A was violative of Art. 14 of the Constitution. But this decision was overruled by a Division Bench of that Court in *The State of West Bengal v. Jute and Jute Goods Buffer Stock Association* (5). The appeal Bench held that neither s 2-A of the Industrial Disputes Act, 1947 nor s. 10 of the said Act offends Art. 14 of the Constitution We are in respectful agreement with this view.

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We answer the reference by saying that s 2-A is *intra vires* the powers of Parliament and is valid.

Let the papers be returned to the learned single Judge with this opinion and answer.

*Question answered.*

## APPELLATE CIVIL

*Before Mr Justice D S Mathur, on difference of opinion between Mr Justice G. C Mathur and Mr Justice H Swarup.*

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APPELLANT,

v.

JAI PRAKASH AND OTHERS

RESPONDENTS. <sup>1978</sup> October, 31

U. P. Zamindari Abolition and Land Reforms Act, 1950, ss 2(1)(c), 1(3) and 117-A and U P Zamindari Abolition Rules, 1952, r 115-C—Act inapplicable to land covered by s 2(1)

(1) AIR 1970 Mys 171

(2) 1960 (19) IF and LR 352

(FB)

(3) AIR. 1970 Mad. 82

(4) 1972 (24) FLR 22.

(5) App. no. 308 of 1971, dated 22 May 1978.

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(c) in the absence of notification under s 1(3)—State Government cannot vest it in Municipal Board—R 115-C in-applicable to such land

If the land is covered by the provisions of cl (c) of sub-s. (1) of s 2 of the Act the Act will not apply to such land in the absence of a notification under s 1(3) of the Act. Such land will not vest in the State Government and the latter will have no power to vest it in the Municipal Board under s 117-A of the Act. For the same reason r 115-C of the U P Zamindari Abolition and Land Reforms Rules will also not apply to such land.

*Held*, that the notification under s. 117-A of the Act and the order of the Tahsildar issued under r 115-C of the U. P. Zamindari Abolition Rules were invalid.

Special Appeal no 99 of 1966 connected with Special Appeal no 339 of 1966 against the order of D D SETH, J., dated 3rd January 1966 in Civil Miscellaneous Writ no 1429 of 1959.

*Ashok Gupta*, for the Appellant.

*Shanti Bhushan, Sudhir Chandra* and S C., for the Opposite-parties.

D S MATHUR, J. —In view of the difference of opinion between brother G C. MATHUR, J. and brother HARI SWARUP, J. the following question has been referred to me for opinion.

“Whether the land in dispute is an area covered by the provisions of cl (c) of sub-s (1) of s 2 of the U P Zamindari Abolition and Land Reforms Act?”

The facts of the case are not in dispute. The land in question formed part of land acquired for the purposes of the Railway under the Land Acquisition Act, 1894. It was in 1943 that the land being surplus was sold by the Railway to Mukand Lal, father of Jai Prakash, petitioner. The U P Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act) came into force on 26th January, 1951, though estates vested in the



ate Government on 1st July, 1952 The material question for consideration is whether the disputed land covered by cl (c) of s 2(1) of the Act If so, in the absence of a notification under s 1(3) of the Act the land would still belong to the intermediary and shall not be one which could or had vested in the State Government, but if the land is not covered by the above clause, it falls in the category of an estate and shall vest in the State Government from 1st July, 1952, and later shall be transferred to the Municipal Board

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The material portion of s 2 of the Act runs as follows

"2(1) The State Government may by notification in the *Gazette* apply the whole or any provision of this Act to any of the following areas or estates subject to such exceptions or modifications not affecting the substance, as the circumstances of the case may require—

\* \* \*

(c) areas held and occupied for a public purpose or a work of public utility and declared as such by the State Government or acquired under the Land Acquisition Act, 1894, the United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948, the United Provinces Acquisition of Property (Flood Relief) Temporary Powers Act, 1948, or any other enactment other than this Act, relating to acquisition of land for a public purpose

\* \* \*

(2) The declaration of the State Government under cl (c) of sub-s (1) shall be conclusive evidence that the land is held and occupied for a public purpose or a work of public utility

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*Explanation*—Any area held on the seventh day of July, 1949, for the purposes of a housing scheme by a Co-operative Society registered under the Co-operative Societies Act, 1912, or a society registered under the Societies Registration Act, 1860, or a limited liability company under the Indian Companies Act, 1913, shall be deemed to be held for a work of public utility "

Brother HARI SWARUP, J. has expressed the opinion that the words "or acquired under the Land Acquisition Act" are an alternative for the earlier expression "declaration as such by the State Government" and, therefore, the land acquired under the Land Acquisition Act as contemplated by this clause must be one which is held and occupied for a public purpose or a work of public utility Brother G C MATHUR, J has expressed a contrary opinion

Punctuation marks are not a good guide for the interpretation of a statute, though in case of any doubt or where the enactment is capable of two interpretations, the punctuation marks, whether added or already existing, can be utilised for giving a proper meaning The underlying object always is to determine and to give effect to the intention of the Legislature

Ordinarily, the courts of law do not have the power to add, substitute or delete words in the enactment but can adopt such a course in exceptional circumstances only when otherwise it is not possible to give effect to the intention of the Legislature.

A perusal of s 1 of the Act shall make it clear that the provisions of the Act were not made applicable to all kinds of land in the State Lands of various kinds

had, one may say, been classified and the Act was made applicable to some kinds of land and not all though the State Government was given the power under s. 1(3) of the Act to extend the provisions of the Act subject to such exceptions or modifications as may be necessary to the areas detailed in cls (a) to (f) of s 2(1) of the Act. In case the State Government was not given the power to extend the provisions of the Act to the areas covered by s 2(1) of the Act, it could be urged with some force that we must not only determine the intention of the Legislature, but forthwith give effect to such intention by including all the areas meant to be governed by the provisions of the Act. However, because the State Government can at a later date extend the provisions of the Act to some or all the areas included in s 2(1) of the Act we need not unnecessarily restrict the scope of s 2(1) as it shall always be open to the State Government to issue a notification and to extend the provisions of the Act to such areas from a specified date.

Another principle which must be kept in mind is that the Legislature has no intention to use superfluous words in the enactment. Each word or expression must be given its proper meaning. In case the Legislature was giving stress to the words "held and occupied for a public purpose or a work of public utility" it was not necessary to include in cl (c) of s 2(1) the second part thereof, namely, "or acquired under the Land Acquisition Act." The earlier part, namely, "areas held and occupied for a public purpose or a work of public utility and declared as such by the State Government" would cover land not only of an intermediary obtained by transfer, gift or devolution but also land purchased from the State or from the Railway which was in the past acquired under one enactment or the other. The stress would have been on the purpose for which the land was held and occupied and not how the

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ownership had passed to the intermediary. Similarly, it would not have been necessary for the Legislature to repeat at a later stage the words "for a public purpose." It is true that the expression "acquisition of land for a public purpose" has reference to enactments other than those detailed in cl (c), but if this expression had not been used and the words "areas held and occupied for a public purpose" covered even land acquired under one enactment or the other it was not necessary to specify the various enactments and also to provide that the acquisition must be for a public purpose.

Considered in this light the second part beginning from "or acquired under the Land Acquisition Act, etc." cannot be covered by the main portion of the earlier part. Sub-s (2) of s 2 of the Act cannot be of any help. It simply provides that the declaration of the State Government under cl (c) shall be conclusive evidence that the land was held and occupied for a public purpose or a work of public utility.

It can be contended on behalf of the appellant that each clause of s 2(1) of the Act covers a distinct category of land, and therefore, all the areas included in cl. (c) must be co-related to a public purpose or a work of public utility. It was evidently for this reason that the expression relating to acquisition of land for a public purpose had been incorporated at the end of the clause to make it clear that the acquisition of land must have been for public purpose. In this view of the matter

there can be no difficulty in dividing cl (c) into two parts both being co-related to "public purpose"

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My answer to the question referred for opinion is that the land in dispute is an area covered by the provisions of cl (c) of sub-s (1) of s 2 of the Act

The case shall now be laid before the Bench concerned for further orders

BY THE COURT—These appeals were heard by us. We were agreed that the land in dispute was included in the term "estate" within the meaning of the U P Zamindari Abolition and Land Reforms Act. But there was a difference of opinion between us on the question whether the land in dispute is an area covered by the provisions of cl (c) of sub-s (1) of s 2 of the U P Zamindari Abolition and Land Reforms Act. On account of this difference this question was referred for opinion to a third Judge. The third Judge has given his opinion that the land in dispute is covered by the provisions of cl (c) of sub-s (1) of s 2 of the Act. That being so, since, admittedly, no notification under s 1(3) of Act has been issued in respect of the land in suit, the Act will not apply to the land in dispute. The land, therefore, did not vest in the State Government and the State Government had no power to vest it in the municipal board under s 117-A of the Act. For the same reason, s 115-C of the U P Zamindari Abolition Rules also did not apply to the land in dispute. Accordingly, the notification dated 11th August, 1954, under s 117-A

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of the Act and the order of the Tahsildar dated 29th September, 1958, under rule 115-C of the Rules are invalid

The learned single Judge rightly allowed the writ petition. The appeals are accordingly dismissed with costs.

*Appeals dismissed*

## SUPREME COURT

## APPELLATE CIVIL

Before Mr Justice P Jaganmohan Reddy  
and K K Mathew

M L SETHI

APPELLANT,

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v.

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R P KAPUR

RESPONDENT.

*Code of Civil Procedure, 1908, O 33 and O 11, r 12—Proceedings for pauperism—Discovery of document.—Can be ordered*

The provisions of r 12 of O 11 relating to discovery of documents apply to proceedings under O 33.

There is no reason to hold, if costs could be saved, that it is not salutary to resort to the procedure of discovery of documents in proceedings under O 33.

—; 1938, O 11, r 21—*Order for discovery of documents—Opposite-party bound to make an affidavit of documents—Production of documents for inspection*

When the court makes an order for discovery under the rule, the opposite-party is bound to make an affidavit of documents and on his failure, he will be subject to the penalties specified in r 21 of O 11.

After he has disclosed the documents by the affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant.

—1903, O 11, r 12—*Document relevant though inadmissible in evidence—Discovery to be ordered*

The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence.

—, 1908, s 115—*Discovery of documents—Jurisdiction—Order not vitiated by error of law*

*Held* that the trial court had jurisdiction to pass the order for discovery. *Held* that such an order is not vitiated by any error of law.

2 H.C. (ILR)—1973—1

1972 Civil Appeal No 665(N) of 1972 from the judgment  
 M. L. SETHI and order dated the 21st August, 1971 of the High  
 R P KAPUR Court of Judicature at Allahabad in Civil Revision  
 No. 680 of 1970

V. M. Tarkunde, (Hardeo Singh, with him) for the  
 Appellant

The Respondent *in person*.

MATHEW, J. — This appeal, by special leave, is from the order of the High Court of Allahabad allowing an application for revision of orders passed by the Civil Judge, Saharanpur, directing discovery of documents by the respondent and dismissing an application by him for permission to sue *in forma pauperis*.

The respondent filed a suit *in forma pauperis* on 29th April, 1962, against the appellant and his wife for recovery of damages to the tune of Rs 7,48,000 for malicious prosecution. Notice of the petition to sue *in forma pauperis* was given to the State Government and the appellant under O 33, r. 6 of the Civil Procedure Code. Both the Government and the appellant filed objections stating that the respondent is not a pauper. The appellant thereafter filed an application for discovery of documents from the respondent for proving that the respondent is not a pauper. The Court passed an order on 23rd February, 1970, directing the respondent to discover on affidavit, the documents relating to the bank accounts of the respondent, namely, pass books, cheque books, counterfoils, etc., from 1st March, 1963 to the date of filing the affidavit of discovery, as also the documents, in respect of the properties held by him and the personal accounts maintained by him. The respondent was to file the affidavit of discovery on 8th March, 1970. It was specifically stated that no extension of time will be



allowed for filing the affidavit and that the discovery should be made within the time. The respondent did not file the affidavit in pursuance to the order. On 31st March, 1970, he moved an application stating that he wants to file a revision against the order dated 23rd February 1970, before the High Court and that two months' time may be allowed for the purpose. The Court rejected the application for time on 4th April, 1970, on the ground that the application for permission to sue *in forma pauperis* was pending for the last seven years and that the respondent had ample time for filing the revision if he was diligent in the matter. The respondent's counsel then moved another application on the same day stating that the respondent wants to adduce evidence and that since he had not come to Court in the expectation that his earlier application dated 31st March, 1970, for adjournment would be allowed, the case may be adjourned. This application was also rejected by the Court. And as counsel for the respondent reported no instruction and as there was no evidence to show that the respondent was a pauper, the Court dismissed the application for permission to sue *in forma pauperis* and directed the respondent to pay the court fee within 15 days.

The respondent challenged the order directing discovery of documents passed on 23rd February, 1970 and that dismissing his application for permission to sue *in forma pauperis* passed on 4th April, 1970, in revision before the High Court.

The High Court held that since the proceedings under rr 6 and 7 of O 33 are summary in character, the "sophisticated procedure" for discovery should not have been resorted to by the appellant, that the documents of which discovery was sought were not specified in the application of the appellant and,

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therefore, the application for discovery was bad, that the enquiry under rr 6 and 7 of O 33 was primarily a matter between the respondent and the State Government and that the trial court should not have adopted the procedure for discovery and inspection at the instance of a private party like the appellant. The Court further held that the trial Court acted with material irregularity as it did not consider the question of the necessity for discovery of the documents or the relevancy of the documents of which discovery was sought and also for the reason that, in ordering discovery of the documents relating to personal accounts, and pass books, it overlooked the right of the respondent to claim privilege. And as regards the order passed on 4th April, 1970, dismissing the application for permission to sue *in forma pauperis* after rejecting the application for adjournment, the Court said that the trial court betrayed an anxiety to get rid of an application to add to the figures of its disposal. The Court, therefore set aside the order for discovery as well as the order dismissing the application for permission to sue *in forma pauperis*.

The respondent submitted that the procedure for discovery of documents is not permissible in proceedings under O 33 and that it is not salutary to adopt the procedure even if permissible. In *Vijay Pratap Singh v Dukh Haran Nath Singh* (1) this Court has held that "the suit commences from the moment an application for permission to sue *in forma pauperis* as required by O 33 is presented". If that be so, the provisions of r 12 of O 11 relating to discovery would in terms apply to proceedings under O. 33. There is

(1) (1962) S.C.R. Supp 2, 675.

also no reason why, if the provisions of O 1, r 10 relating to additions of parties, of O 9 dealing with appearance of parties and consequence of non-appearance, and of O 39 relating to temporary injunctions would apply to proceeding under O 33, the provisions in O 11 dealing with discovery of documents should not apply to such proceedings. In England, discovery is ordered in any 'cause' or 'matter' in the Supreme Court to which the rules of the Supreme Court apply. And 'cause' includes any action, suit or other original proceeding between a plaintiff and defendant. Generally speaking, discovery is granted there in all proceedings except purely criminal proceedings, and civil proceedings where the action is brought merely to establish a forfeiture or enforce a penalty (Halsbury's Laws of Eng., Vol 12 p 2). There is no reason to hold, if costs could be saved, that it is not salutary resort to the procedure in proceedings under O 33.

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We think that the High Court was wrong in holding that since the application for discovery did not specify the documents sought to be discovered, the lower Court acted illegally in the exercise of its jurisdiction in ordering discovery. Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite-party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite-party to produce the documents. And how can a party do this unless he knows what documents are in the possession or power of the opposite-party? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw

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M. L. SETHI light upon the question in controversy, how is it possible for him to ask for discovery of specific documents?  
R. P. KATUR O 11, r 12 provides

Mathew, J.

“12 Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the suit or make such order, either generally or limited to certain classes of documents, as may in its discretion, be thought fit. Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.”

When the Court makes an order for discovery under the rule, the opposite-party is bound to make an affidavit of documents and if he fails to do so, he will be subject to the penalties specified in r 21 of O 11. An affidavit of documents shall set forth all the documents which are, or have been in his possession or power relating to the matter in question in the proceedings. And as to the documents which are not, but have been in his possession or power he must state what has become of them and in whose possession they are, in order that the opposite-party may be enabled to get production from the persons who have possession of them (see form no 5 in App C of the Civil Procedure Code). After he has disclosed the documents by the affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant.

The High Court was equally wrong in thinking that in passing the order for discovery, the trial Court acted illegally in the exercise of its jurisdiction as it deprived the respondent of his right to claim privilege for non-production of his pass book and personal account, because the stage for claiming privilege had not yet been reached. That would be reached only when the affidavit of discovery is made. O. 11, r. 13 provides that every affidavit of documents should specify which of the documents therein set forth the party objects to produce for inspection of the opposite-party together with the grounds of objection.

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Nor do we think that the High Court was right in holding that the documents ordered to be discovered were not relevant to the inquiry. The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences. The word 'document' in this context includes anything that is written or printed, no matter what the material may be upon which the writing or printing is inserted or imprinted. We think that the documents of which the discovery was sought would throw light on the means of the respondent to pay court-fee and hence relevant.

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We venture to think that the High Court was labouring under a mistake when it said that the enquiry into the question whether the respondent was a pauper was exclusively a matter between him and the State Government and that the appellant was not interested in establishing that the respondent was not a pauper. O 33, r. 6 provides that if the Court does not reject the application under r. 5, the Court shall fix a day of which at least 10 days' notice shall be given to the opposite-party and the Government pleader for receiving such evidence as the applicant may adduce in proof of pauperism and for hearing *any evidence in disproof thereof*. Under O 33, r. 9, it is open to the Court on the application of the defendant to dispauper the plaintiff on the grounds specified therein, one of them being that his means are such that he ought not to continue to sue as a pauper. An immunity from a litigation unless the requisite court fee is paid by the plaintiff is a valuable right for the defendant. And does it not follow as a corollary that the proceedings to establish that the applicant-plaintiff is a pauper, which will take away that immunity, is a proceeding in which the defendant is vitally interested? To what purpose does O 33, r. 6 confer the right on the opposite-party to participate in the enquiry into the pauperism and adduce evidence to establish that the applicant is not a pauper unless the opposite-party is interested in the question and entitled to avail himself of all the normal procedure to establish it? We can think of no reason why if the procedure for discovery is applicable to proceedings under O 33, the appellant should not be entitled to avail himself of it.

We also do not think that there is any point in the criticism of the High Court that the order for discovery was vague. The first item in the order was in respect

of the documents relating to the bank accounts of the respondent from 1st March, 1963, to the date of the affidavit. The second item related to documents in respect of the immovable properties held by him during the same period and the third item was in respect of documents relating to the personal accounts maintained by him for the same period. The order was as specific as it could be.

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Counsel for the appellant contended that even if the order for discovery of documents was bad in law, the High Court was not justified in interfering with it. And as regards the order dated 4th April, 1970, dismissing the application for permission to sue *in forma pauperis* after rejecting the application for time, he said, the High Court was really interfering with the discretion of the trial Court in the matter of adjournment. The jurisdiction of the High Court under s 115 of the Civil Procedure Code is a limited one. As long ago as 1884, in *Rajah Amir Hassan Khan v Sheo Baksh Singh* (1), the Privy Council made the following observation on s 622 of the former Code of Civil Procedure, which was replaced by s 115 of the Code of 1908:

“The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.”

(1) (1884) I L.R. 11 I.A. 237

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In *Balakrishna Udyar v Vasudeva Aiyar* (1), the Board observed

“It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.”

In *N S Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras* (2), the Judicial Committee said that s 115 empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court is within its jurisdiction, (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. And if the High Court is satisfied on those three matters, it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law.

This Court, in *Manidra Land and Building Corporation Ltd v Bhutnath Banerjee* (3) and *Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Saffibhai* (4) has held that a distinction must be drawn between the errors committed by subordinate courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the

(1) (1917) L R 44 I A 261, 267.  
(3) A I R 1964 S C. 1386.

(2) (1948-49) L R 76, I A 73.  
(4) A I R. 1964 S.C. 1341.



said Court, and errors of law which have no such relation or connection. In *Pandurang Dhoni Chowgule v Maruti Hari Jadhav* (1), this Court said.

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"The provisions of s 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under s 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As cls (a), (b) and (c) of s 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these plea can be said to be concerned with questions of jurisdiction which fall within the purview of s 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under s 115."

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The word "jurisdiction" is a verbal coat of many colours. Jurisdiction originally seems to have had the meaning which Lord REID ascribed to it in *Anisminic Ltd v Foreign Compensation Commission* (1) namely, the entitlement "to enter upon the enquiry in question" If there was an entitlement to enter upon an enquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord DANMAN in *R V Bolton* (2) He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry In *Anisminic Ltd*, (1), LORD REID said:

"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity It may have given its decision in bad faith. It may have made a decision which it had no power to make It may have failed in the course of the enquiry to comply with the requirements of natural justice It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it It may have refused to take into account something which it was required to take into account Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account I do not intend this list to be exhaustive"

In the same case, Lord PEARCE said:

Lack of jurisdiction may arise in various ways There may be an absence of those formalities or

(1) (1969) 2 A C, 147,

(2) (1941) 1 Q B, 66.

things which are conditions precedence to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make Or, in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice, or it may ask itself the wrong questions, or it may take into account matters which it was not directed to take into account Thereby it would step outside its jurisdiction It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct Any of these things would cause its purported decision to be a nullity"

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The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction" The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point The practical effect of the decision is that any error of law can be reckoned as jurisdictional This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error Whether there is excess of jurisdiction or merely error within

1972 jurisdiction can be determined only by construing the  
empowering statute, which will give little guidance.  
M L SETHI It is really a question of how much latitude the Court  
v is prepared to allow In the end it can only be a value  
R P KAPUR judgement (see H W R Wade, "Constitutional and  
Mathew, J Administrative Aspects of the Anismanic case", Law  
Quarterly Review, Vol 85, 1969, p 198) Why is it  
that a wrong decision on a question of limitation or  
*res judicata* was treated as a jurisdictional error and  
liable to be interfered with in revision? It is a bit  
difficult to understand how an erroneous decision on  
a question of limitation or *res judicata* would oust the  
jurisdiction of the Court in the primitive sense of the  
term and render the decision or a decree embodying  
the decision a nullity liable to collateral attack. The  
reason can only be that the error of law was considered  
as vital by the Court And there is no yardstick to  
determine the magnitude of the error other than the  
opinion of the Court

The trial Court had jurisdiction to pass the order  
for discovery Even if lack of jurisdiction is assumed  
to result from every material error of law—even an  
error of law within the jurisdiction in the primitive  
sense of the term—we do not think the order was vitiat-  
ed by any error of law The rejection of the applica-  
tion for time and the consequent dismissal of the peti-  
tion for permission to sue *in forma pauperis* can hardly  
be said to sound in jurisdictional error even in its extend-  
ed sense, as already explained We are also not satis-  
fied that the refusal to adjourn occasioned any failure  
of natural justice so as to render the order a nullity  
Nor is there anything to show that in rejecting the  
application for time the Court acted illegally or with  
material irregularity in the exercise of its jurisdiction.

We would, therefore, set aside the order of the High

Court and allow the appeal but in the circumstances make no order as to costs. This order will not in any way affect the validity of the order passed by the High Court on August 26, 1971, directing the respondent to delete the name of the wife of the appellant from the array of parties.

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*Appeal allowed*

## CIVIL MISCELLANEOUS

*Before Mr Justice S Chandra and  
Mr Justice N D Ojha*

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AND OTHERS . . . OPPOSITE PARTIES  
v.

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**U. P. Tenancy Act, 1939, s 180—Effect of Amending Act, 10 of 1947—Ambit of s 180 widened—Suit maintainable under s 180 after the amendment in 1947 even if the land in dispute may be of a nature that hereditary rights cannot accrue in it.**

After the addition of the proviso to sub-s (2) a suit under s 180 would be maintainable even if the consequence mentioned in sub-s (2) did not accrue in cases where the proviso becomes applicable.

After the amendment of 1947 the only condition precedent to the maintainability of a suit under s 180 is that the plaintiff should be entitled to admit the defendant to occupy the plot. So even if prior to 1947 a suit under s 180 may not have been maintainable in relation to grove land such a suit was competent after the amendment.

*Mahabir Pd v Smt Bhaggo* (1), relied and cited, *Rasul Ahmad v Beni Pd* (2), *Lunkush v Rajendra Sahai* (3) and *Mahadeo v Satyendra Kumar* (4) distinguished.

(1) 1965 A L J 777

(2) A L R, 1950 Al. 528,

(3) 1965 A L J 70

(4) A I R 1953 All, 85.

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U P Consolidation of Holdings Act, 1953, s. 49—Suits for declaration or adjudication of rights of persons governed by U P. Tenancy Act—Not barred

Consolidation authorities have not been empowered to adjudicate rights of persons who are not tenure-holders as defined by the Act in relation to rights in land, the bar created by s. 49 can extend to suits which relate to declaration or adjudication of rights of tenure-holders, such as *bhumidhar*, *sindar* or *asami*. It does not bar suits relating to declaration or adjudication of rights governed by the U. P. Tenancy Act. *Held*, that as the land in dispute was governed by the U. P. Tenancy Act, U P Consolidation of Holdings Act was not applicable to it and the authorities under the U. P. Consolidation of Holdings Act had no jurisdiction to adjudicate the rights to such land and their findings were void as being without jurisdiction.

Civil Miscellaneous Writ Petition No. 1645 of 1972.

*B N Asthana* and *P K Misra*, for the Petitioner.

*S C* for the Opposite-parties.

*S CHANDRA, J.*—Finding a conflict of opinion between *Lunkush v Rajendra Sahai* (1) and *Rasul Ahmad v Beni Prasad* (2) a learned single Judge has referred this case to a larger Bench. That is how the matter has been placed before us.

The Union of India (respondent no. 4) instituted a suit under s. 180 of the U. P. Tenancy Act against the petitioners' father for his ejectment from the plot in dispute and for damages. The plaintiff's case was that this plot had been acquired by the Government of India in 1942. The defendant had illegally occupied it in 1376 F. The defence was that the suit was not maintainable under s. 180 of the U. P. Tenancy Act, that it was barred by limitation and also that it was barred by s. 49 of the U. P. Consolidation of Holdings Act.

The Sub-Divisional Officer repelled the various pleas in bar and decreed the suit. This decree was upheld in appeal as well as in second appeal. Aggrieved the

(1) A.I.R. 1950 All. 528

(2) 1965 A.L.J. 70

petitioners have come to this Court under Art. 226 of the Constitution and have reiterated the same pleas before us. In regard to the maintainability of the suit under s 180 of the U P Tenancy Act learned counsel for the petitioners invited our attention to a decision of a single Judge in *Lunkush v Rajendra Sahai* (1). In that case a suit for ejectment from a grove land was filed in the civil court prior to 1947. It was argued that the civil court had no jurisdiction. It was held that s 180 of the U P Tenancy Act was not applicable to grove land. The reasons being firstly, that although the section speaks of 'land' which includes a 'grove land' it speaks of land to which a person can be admitted as a 'tenant' which expression does not include a grove holder, and, secondly, that on the expiry of the period of limitation, the person in possession becomes a hereditary tenant and no person can become a hereditary tenant of a grove land.

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In *Mahadeo Das v Satyandra Kumar* (2) a full Bench was concerned with the question as to whether s 180 of the U P Tenancy Act was applicable to grove land. The Full Bench held that the decision in *D N Rega v Kazi Muhammad Haider* (3) was distinguishable on facts. The Bench went on to make the following *obiter* observations:

"S 180 applies to 'land' to which somebody could be admitted as a tenant and which land becomes the hereditary tenancy of the trespasser if he was claiming as tenant, or which becomes *khudkasht* land if the defendant was a co-sharer and was claiming the land as his *khudkasht*. Although 'land' as defined in the U P Tenancy Act includes

(1) AIR 1950 All 528 (2) AIR, 1953 All 85 (F.B.)  
 (3) 1949 A.L.J. 369,

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grove land, yet the definition is subject to the exception "unless the contrary appears" The contrary appears from the context in which the word 'land' is used in s 180 A grove-holder is not a tenant under the Tenancy Act except for certain purposes, and a trespasser of grove-land cannot become a hereditary tenant or a *khudkasht*-holder. It follows that the word 'land' used in s 180 is confined to agricultural land"

In the case before the Full Bench the suit was filed in 1946 Prior to its amendment by U P Act No 10 of 1947 s 180 of the U P Tenancy Act provided for a suit for ejectment at the instance of a person entitled to admit him as tenant The condition precedent to the applicability of the section was that the plaintiff should be a person entitled to admit the defendant as a tenant The section was inapplicable to those class of cases where the plaintiff by reason of his status was not entitled to admit the defendant as tenant, for instance a grove-holder, sub-tenant or non-occupancy tenant, etc Sub-s. (2) of s 180 provides

"(2) If no suit is brought under this section, or if a decree obtained under this section is not executed, the person in possession shall, on the expiry of the period of limitation prescribed for such a suit, become a hereditary tenant of such plot or plots"

By the Amending Act 10 of 1947 the phrase 'person entitled to admit him as tenant' was repealed and substituted by the phrase 'person entitled to admit him to occupy such plot' It was no longer necessary that the plaintiff should be in a position to admit the defendant as the tenant It was now sufficient if he could permit him to occupy the plot. Obviously the ambit of



s 180 was considerably widened Sub-s (2) was also amended and the following proviso was added

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"Provided that where the person in possession cannot be admitted to such plot except as sub-tenant by the person entitled to admit, the provisions of this sub-section shall not apply until the interest of the person so entitled to admit is extinguished in such plot under s 45(f) "

With the addition of the proviso to sub-s. (2), a suit under s 180 would be maintainable even if the consequence mentioned in sub-s (2) did not accrue in cases where the proviso becomes applicable. It cannot hence be said that sub-s (2) any longer laid down a condition precedent to the maintainability of a suit under s 180 in the sense that such a suit will not be competent if the defendant could not become a hereditary tenant or a *khudkasht*-holder After the amendment of 1947 the only condition precedent to the maintainability of a suit under s 180 is that the plaintiff should be entitled to admit the defendant to occupy the plot So even if prior to 1947 a suit under s 180 may not have been maintainable in relation to grove land, such a suit was competent after the amendment. The decisions in *Lunkush v Rajendra Sahai* (1) and *Mahadeo Das v Satyandra Kumar* (2) related to s 180 as it was prior to its amendment in 1947. Those decisions are not helpful in construing the section after it had been amended in 1947

This matter came up for consideration in *Rasul Ahmed v Beni Prasad* (3) It was noticed that in some cases prior to the amendment of s 180 by U. P. Act No 10 of 1947 sub-ss (1) and (2) of s 180 of the U. P. Tenancy Act were read together for deciding who were

(1) AIR, 1950 All, 528

(2) AIR, 1953 All 85 (F B).

(3) 1965 A.L.J 70.

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competent to sue, but that was because of the difficulty created by the words used in the section as it stood before the amendment. Sub-s (2) of s 180 was, however, never regarded as curtailing the scope of sub-s. (1) in regard of the kind of land in respect of which a suit could be brought under it. The scope of sub-s (1) of s 180 cannot be restricted by sub-s (2) and it is not possible to construe sub-s (1) of s 180 as limited to suits for that kind of land only in respect of which the consequences mentioned in sub-s (2) of the section may ensue.

Our attention was invited to a Division Bench decision in *Mahabir prasad v Smt Bhaggoo* (1). In that case a suit for ejectment was filed in the civil court in relation to an enclosed piece of land, having on it three residential apartments, servants' quarters and a well. Para 2 of the decision indicates that the suit was filed in 1946 i.e. prior to the amending Act of 1947. It was argued that the suit was not maintainable in the civil court because it lay in the revenue court under s 180 of the U P Tenancy Act. The Bench held that the land with buildings on it was not land as defined in the Tenancy Act. It, however, went on to make *obiter* observation that there was good authority for the proposition that land to which somebody cannot be admitted as a tenant, even though used for the purpose of a grove, would not be land within the meaning of s 180, U P Tenancy Act. These observations show that the Bench was considering s 180 as it stood prior to its amendment. But after 1947 even if the land in dispute may be of a nature that hereditary tenancy right cannot accrue in it yet the suit for ejectment was maintainable under s 180, U P.

(1) 1965 A.L.J. 777.

Tenancy Act The present suit was maintainable under s 180

It was then urged that the suit was barred by s 49 of the U P Consolidation of Holdings Act

S 49 of the U P Consolidation of Holdings Act is in two parts The opening part provides that the declaration and adjudication of rights of tenure-holders in respect of land lying in an area for which a notification has been issued under sub-s (2) of s 4 as well as adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act shall be done in accordance with the provisions of this Act. By the second part it bars the jurisdiction of civil and revenue courts from entertaining any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under the Act S 3(11) defines a 'tenure-holder' as meaning a *bhumidhar*, *sirdar* of the land concerned and includes an *asami* S 3(2-A) defines the 'consolidation area' as the area in respect of which a notification under s 4 has been issued, except such portions thereof to which the provisions of the U P Zamindari Abolition and Land Reforms Act, 1950 do not apply Thus the definition of a tenure-holder as well as consolidation area suggests that land to which U P Tenancy Act applies with the result that the persons who have rights like occupancy and hereditary tenants etc recognised by the U. P. Tenancy Act, are outside the purview of the U P. Consolidation of Holdings Act In regard to declaration or adjudication of rights s 9 of the Act is the only provision for raising disputes as to rights in respect of land It contemplates adjudication of rights of tenure-holders only at the instance either of the tenure-holder

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or any other person interested. Consolidation authorities have not been empowered to adjudicate rights of persons who are not tenure-holders as defined by the Act. In relation to rights in land, the bar created by s. 4) can extend to suits which relate to declaration or adjudication of rights of tenure-holders, that is to say, of *bhumidhar*, *sirdar* or *asami*. It does not bar suits relating to declaration or adjudication of rights of persons governed by the U. P. Tenancy Act. This question came up for consideration in *Badri Dube v The Commissioner, Varanasi* (1). The learned single Judge after an elaborate discussion of various aspects held that the Consolidation of Holdings Act applies only to such areas where the U. P. Zamindari Abolition and Land Reforms Act is in force. We are in agreement with this view. The second point urged in support of the writ petition is without merit.

The next point urged by learned counsel for the petitioner was that the suit was barred by limitation. The trial court held that the period of 30 years limitation will apply. The lower appellate court, however, reversed this view. It held that the special rule for limitation as provided under s. 180(2) of the U. P. Tenancy Act would be applicable. On facts it was found that the defendant trespassed on the land in dispute within two years of the institution of the suit and so the suit was not barred by limitation. For the petitioner it was urged that the lower appellate court did not consider the effect of proceedings under the U. P. Consolidation of Holdings Act where it was found that the defendant had been in possession for a much longer period. The land in dispute was governed by the U. P. Tenancy Act. The U. P. Consolidation of Holdings Act was not applicable to it. As already seen

(1) 1969 A.W.R. 817.

the U P Consolidation of Holdings Act is not applicable to lands governed by the U P Tenancy Act. That being so the authorities under the U P Consolidation of Holdings Act had no jurisdiction whatever to undertake the adjudication or declaration of rights with respect to such land, findings, if any, arrived at by the consolidation authorities being without jurisdiction were entirely void. The lower appellate court did not commit any error of law in ignoring such void proceedings. The finding of fact that the defendant trespassed on the land within two years of the institution of the suit does not disclose any manifest error of law.

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The various points urged in support of the writ petition having failed, the same is dismissed with costs.

*Petition dismissed*

## APPELLATE CIVIL

*Before Mr Justice S Chandra and  
Mr Justice C D Parekh*

SURENDRA NARAIN DUBEY . APPELLANT,

*v.*

DEPUTY DIRECTOR, CONSO-

LIDATION AND OTHERS

RESPONDENTS

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**U. P. Zamindari Abolition and Land Reforms Act, 1950**  
*ss 229-C and 234-A—Recorded occupant in 1356 F—Becomes*  
*adhivasi under s 20(b)(i) and sirdar from 30th October,*  
*1954—Suit for declaration of sirdar not maintainable*

§ 229-C read with s 234-A provides for a suit for a declaration of a person claiming to be an *adhivasi*. Evidently such a suit was maintainable only so long as a person could,

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in law, claim to be an *adhivasi*. With effect from 30th October, 1954, when Chap IX was added to the Zamindari Abolition and Land Reforms Act, *adhivasi* becomes *sirdars* and the erstwhile *bhumidhars* lost their interests. With effect from that date the respondents, who were till then claiming to be *adhivasis*, could no longer be termed as persons claiming to be *adhivasis* within the meaning of s 229-C and so a suit for declaration of rights of a person claiming to be *sirdar* could not validly be instituted after 30th October, 1954 and no declaration of right as an *adhivasi* could effectively be made in 1960.

———, 1950, s 229-C—*Suit for declaration of sirdar—Government and Gaon Sabha not impleaded—Effect of compromise in such a suit—Compromise decree is nullity—No estoppel*

If the Statute requires that the declaration of rights of *sirdar* can take place only in the presence of the State Government and Gaon Sabha, then, an agreement in the absence of these parties would be violative of such a statutory provision. No plea of estoppel can be based on a transaction which violates a mandatory statutory provision.

Special Appeal No 47 of 1968 from the judgment and decree of R S PATHAK, J in Writ No 759 of 1963 dated 24th November, 1967

S K Verma, for the Appellant

S CHANDRA, J —This special appeal has come back to this Court on remand by the Supreme Court for a fresh decision in accordance with law

The appellants were recorded as *sir-khudkasht*-holders of the plots in dispute. Respondents nos 4 to 6 were entered as sub-tenants in respect of those plots in the year 1956 F. The appellants filed a suit for declaration that the respondents were not *adhivasis*. The suit was decreed *ex parte*. The *ex parte* order was, however, set aside on the application of the respondents. The suit was subsequently withdrawn with liberty to file fresh suit. It appears that in 1960 three

suits were filed under s. 229-C, Zamindari Abolition Act for declaration. The principal allegation in these suits was that the revenue entries in the revenue records on the basis of which the respondents claimed *adhivasi* rights were fictitious. The parties then entered into a compromise in which it was admitted by the respondents that the appellants were *bhumidhars* and the respondents had no interest in the disputed property. It was also admitted that the entry in the revenue records in favour of the respondents was fictitious. The suits were consequently decreed. The respondents applied for the setting aside of the decrees on the ground that they were obtained fraudulently. Those applications were pending when proceedings were taken for the consolidation of the holdings under the U. P. Consolidation of Holdings Act. The consolidation authorities held that the suits under s. 229-C were not maintainable because on the date when the suits were filed the respondents had become *sirdars*. In the alternative, it was held that the admission of the respondents that they were not *adhivasis* could not operate against the statute inasmuch as s. 20 (b) (i) of the aforesaid Act provided that a person recorded as an occupant in 1356 F. would become an *adhivasi*. The appellants filed a petition under Art. 226 of the Constitution challenging the orders made by the consolidation authorities.

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A learned single Judge, *inter alia*, held that even if the entry was fictitious it could not be ignored and so the respondents, who were recorded as occupants in the papers of 1356 F., became *adhivasis*. With effect from 30th October, 1954 they became *sirdars* and the appellants ceased to be *bhumidhars* by reason of s. 240-A of the Zamindari Abolition Act. The writ

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petition was dismissed. An appeal against that judgement was dismissed *in limine*.

Thereafter the appellants went up in appeal to the Supreme Court. The Supreme Court held that in view of its decision in *Smt. Sonawati v. Sri Ram* (1) a fictitious entry obtained surreptitiously or fraudulently could not confer any rights. If there was evidence to show that the entry was fictitious it could not confer the rights of an *adhrvasi*. On this view the judgement of the High Court was set aside and the case was sent back for decision afresh.

Two principal questions arise for consideration. One is as to whether the entry of 1356 F. in favour of the respondents was fictitious and the second question is as to the legal effect of the compromise decree by which the suits under s. 229-C were disposed of.

S. 229-C read with s. 234-A provides for a suit for a declaration of a person claiming to be an *adhrvasi*. Evidently such a suit was maintainable only so long as a person could, in law, claim to be an *adhrvasi*. With effect from 30th October, 1954 when Chap. IX was added to the Zamindari Abolition Act *adhrvasis* became *sirdars* and the erstwhile *bhumidhars* lost their interests. With effect from that date the respondents, who were till then claiming to be *adhrvasis* could no longer be termed as persons claiming to be *adhrvasis* within the meaning of s. 229-C and so a suit, for a declaration of rights of a person claiming to be a *sirdar* could not validly be instituted after 30th October, 1954. In the instant case, the suits under s. 229-C were instituted on 19th February, 1960. On that date, it could not be said that the defendants to that suit were claiming to be *adhrvasis*. No declaration of rights as an *adhrvasi*



could effectively be made in 1960. We are of opinion that the suits were not maintainable and so the decree passed in such a suit was without jurisdiction.

It may be noticed that the suits for declaration, which were filed on 19th February, 1960 stood decreed a few days later on 22nd February, 1960 because the parties filed a compromise. In the compromise it was stated that the plaintiffs were the *bhumidhars* while the defendants had no interest in the plots and that the entry in their favour in 1356 F. was fictitious.

While s. 229-C was confined to suits for a declaration of rights of a person claiming to be *adhivasi* or an *asami*, s. 229-B specifically provided for a declaratory suit, *inter alia*, by a person claiming to be a *bhumidhar* or a *sirdar*. The plaintiffs of that suit, who could claim themselves to be the *bhumidhars*, could validly file a suit for a declaration under s. 229-B. In such a suit the right or title of the defendant to have become *adhivasi* and then *sirdar* could have been adjudicated. But in view of sub-s (3) of s. 229-B such a suit for a declaration lay primarily against the State and the Gaon Sabha. In *Parsottam v Narottam* (1) a Division Bench of this Court has held:

"In other words a suit for the declaration of *bhumidhari* or *sirdari* rights is to be filed against the State Government and the Gaon Sabha and any other person who claims *bhumidhari* or *sirdari* rights in such land has also to be impleaded as a party. The suit contemplated by the provisions of s. 229-B is directed primarily against the State Government and the Gaon Sabha"

Thus the State Government and the Gaon Sabha were necessary parties to such a suit. They were not impleaded as parties at all. The reason is obvious. If

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the State Government and the Gaon Sabha had been impleaded the suit could not have been possibly decreed on the basis of the compromise only three or four days after its institution. It is thus clear that the suit for declaration could not, in law, be treated as one for declaration of rights under s 229-B.

Keeping in view the provisions of ss 229-B and 229-C it is clear that s 229-C is not a substitute for a suit under s 229-B. When the suits were filed in 1960 the defendant-respondents, on their own claim, had become *sirdars*. The appellants claimed themselves to be *bhumidhars*. The dispute whether the defendant-respondents were *sirdars* could be adjudicated only in a suit under s 229-B. Such a controversy was clearly outside the purview of s 229-C. The decree obtained in that suit hence could not, in law, operate as a declaration of rights of *sirdar* claimed by the defendant-respondents. On this ground also the decree was a nullity.

It was urged on behalf of the appellants that the decree being based on a compromise would nevertheless operate as an estoppel. In our opinion, the court was not competent to look into the agreement between the parties and give effect to it. It is well settled that there is no estoppel against statute. If the statute requires that the declaration of rights of a *sirdar* can take place only in the presence of the State Government and the Gaon Sabha, then, an agreement in the absence of these parties would be violative of such a statutory provision. No plea of estoppel can be based on a transaction which violates a mandatory statutory provision. In *Ferozi Lal Jain v Man Mal* (1) it has been held that after the Rent Control Act came into force a decree

(1) A I R 1970 S.C. 794.

for recovery of possession can be passed by any court only if that court is satisfied that one or more of the grounds mentioned in s 13(1) have been proved. The jurisdiction of the court to pass such a decree depended upon its satisfaction as to the existence of the grounds. In that case the parties had entered into a compromise and the court had passed a decree simply on that basis. The Supreme Court held that at no stage the court was called upon to apply its mind as to whether the alleged sub-letting was true or not. Order made by it does not show that it was satisfied that the sub-letting complained of had taken place, nor is there any other material on record to show that it was so satisfied. It is clear from the record that the court had proceeded solely on the basis of the compromise arrived at between the parties. That being so there can be hardly any doubt that the court was not competent to pass the impugned decree. Hence the decree under execution must be held to be a nullity. The principle enunciated by this decision is applicable to the present case. No declaration as to *sirdari* rights could be validly given in the absence of the State and the Gaon Sabha. In the absence of these parties no court could validly grant a decree based solely upon a compromise. Such a decree would be nullity.

In our opinion, the compromise decree was unenforceable and could not be given effect to in the present proceedings.

It was also urged that the compromise decree was not final so as to be operative between the parties because an application for setting it aside had already been made by the defendants to that suit when the consolidation proceedings commenced. The question whether a decree was obtained fraudulently is open for adjudication by the consolidation authorities. See *Jagarnath*

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*Shukla v. S R. Pande* (1). Even so, it is unnecessary to discuss this point any further because the consolidation authorities have not, in fact, gone into that question and recorded any finding whether the compromise decree was obtained fraudulently or surreptitiously. Since in our view that decree was not enforceable even if it were held not to have been obtained fraudulently it is unnecessary to send the case back for a finding on this point.

At the hearing of the writ petition before a learned single Judge it was argued on behalf of the appellants that the entry of 1356 F. in favour of the respondents was fictitious. A learned single Judge held that even so it could not be ignored. This view was set aside by the Supreme Court. From a perusal of the various orders of the consolidation authorities it appears that at no stage had the appellants taken up the plea that the entry of 1356 F. was fictitious. The Consolidation Officer had given effect to that entry on the basis that it was a genuine entry. On appeal the Settlement Officer proceeded on the basis that it was admitted that the defendants were recorded as occupants in 1356 F. and became *adhivasis* on the date of vesting. Before the Deputy Director also the question that the entry was fictitious was not raised. Under the circumstances the appellants were not entitled to raise a fresh point in the writ petition specially when it required going into the factual aspects. A perusal of the judgment of the learned single Judge shows that he did not really intend to entertain the plea. He countered the submission raised upon this plea by holding that even if the entries were fictitious they were nevertheless entries operative in law for the purpose of conferring *adhivasi* rights. Under these circumstances we are not

(1) 1969 A.L.J. 768.

inclined to entertain the plea that the entry of 1356 F. was fictitious or fraudulent

In the result, the appeal fails and is accordingly dismissed with costs.

*Appeal dismissed.*

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## CIVIL MISCELLANEOUS

*Before Mr. Justice Omprakash Trivedi\**

BANSIDHAR SHARMA ... PETITIONER.

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DEPUTY DIRECTOR, EDUCATION, VI REGION, AND OTHERS ... OPPOSITE-PARTIES.

*Intermediate Education Act, 1921, s. 16-G(3)—Service of teacher—Termination of—Approval of District Inspector of Schools cannot be granted subsequent to the termination.*

S 16-G (3)(a) contains a prohibition against the discharge, removal or dismissal from service of a Principal, Head Master or a teacher except with prior approval in writing of the Inspector. The approval cannot be granted subsequently.

*Municipal Board, Bareilly v. B. K. Mehrotra* (1) relied on.

*Managing Committee v. Indrapal Gupta* (2) distinguished

Writ Petition No 635 of 1970 under Art. 226 of the Constitution of India.

*D. S. Bapnai*, for the Petitioner.

*Umesh Chandra*, for the Opposite-parties nos. 1 and 2.

\*While sitting at Lucknow.

(1) 1968 A.L.J. 1127.

(2) 1973 A.L.J. 436.

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O P. TRIVEDI, J.:—This petition under Art. 226 of the Constitution of India has been filed by Bansidhar Sharma who was appointed a Lecturer in the Mansadın Shukla Intermediate College, Lucknow on 16th July, 1963 and was confirmed on that post in 1964. It is admitted that the College is governed by the provisions of the Intermediate Education Act, hereinafter referred to as the Act, and the Regulations framed thereunder. The management of the College is vested in a Managing Committee, opposite-party no. 4, of which opposite-party no. 5 is the Manager and opposite-party no. 6 is the Principal of the College. The petitioner was suspended by the Manager of the College by order dated 18th May, 1967 (Ann. 3 of the petition). On 19th May, 1968 the Managing Committee, opposite-party no. 4, passed a resolution proposing the termination of petitioner's services as a measure of punishment on charges framed against him. This resolution was forwarded by the Managing Committee for approval to the District Inspector of Schools, Lucknow, opposite-party no. 2 on 4th June, 1968 under s 16-G of the Act. But before approval of the District Inspector of Schools could be obtained, the Managing Committee stopped payment of subsistence allowance to the petitioner with effect from the date of the resolution viz. 19th May, 1968 treating the petitioner's services as already terminated with effect from the same date and an entry to that effect was also made in the College Pay Roll against the name of the petitioner. The petitioner contends that termination of his services by the Managing Committee without obtaining prior approval of the District Inspector of Schools under s. 16-G of the Act was illegal and invalid in law. By letter dated 23rd July, 1968 the petitioner represented to the Manager of the College that subsistence allowance was not being paid to him and if his services was not ter-

minated then orders may be passed for payment of the allowance to him. Copy of this was endorsed to opposite-parties 1 and 2. The Manager did not reply to this representation, whereupon the petitioner made similar representation to the District Inspector of Schools, opposite-party no. 2. By letter dated 10th October, 1968, the District Inspector of Schools, opposite-party no. 2, declined to accord approval to the resolution on the ground that it has already been implemented in breach of s. 16-G of the Act (Ann. 14 of the petition). The Managing Committee appealed against this order to Deputy Director of Education, opposite-party no. 1, who decided the same by order dated 14th February, 1969 (Ann. 15 of the petition) observing that the matter had been disposed of by the District Inspector of Schools on a technical view of the matter and directing him to consider whether the charges levelled against the petitioner stood substantiated and to decide the matter afresh. The District Inspector of Schools by order dated 29th September, 1969 again disapproved the resolution for termination of petitioner's services and ordered a lesser penalty directing that the petitioner shall be reinstated on his post and paid full salary for the period of suspension except from 14th December, 1966 to 31st March, 1967; one increment of the petitioner will be stopped with accumulative effect and the suspension period except 14th December, 1966 to 31st March, 1967 was not to be accounted towards the petitioner's pension and the period from 14th December, 1966 to 31st March, 1967 was to be treated without pay. The petitioner was further directed to be given a warning to work with due care in future (Ann. 17 of the petition). Both the petitioner and the Managing Committee appealed subsequently against this order to the Deputy Director of Education, opposite-party no. 1, who disposed of both the

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appeals by an order dated 12th February, 1970 (Ann 19 of the petition) The petitioner's appeal was dismissed The appeal of the Managing Committee was allowed and the resolution of the Managing Committee dated 19th May, 1968 terminating the petitioner's services was approved.

The petitioner challenges validity of the order of the Deputy Director of Education, dated 12th February, 1970, of which Ann 19 is a copy, as well as the order of the District Inspector of Schools, dated 29th September, 1969 of which Ann 17 is a copy and prays that *certiorari* be issued quashing both these orders The petitioner also prays for *mandamus* commanding the opposite-parties to treat the petitioner as still a Lecturer in Mathematics without break and further to direct opposite-party no 4 to pay the full salary including dearness allowance along with earned increments to the petitioner with effect from 15th May, 1967 The validity of the approval of the resolution by the Deputy Director of Education (Ann 19) is challenged on the ground that the Managing Committee, opposite-party no 4, had implemented the proposed termination of petitioner's services with effect from 19th May, 1968 without obtaining prior approval of the District Inspector of Schools in violation of s 16-G of the Act The order of punishment by the District Inspector of Schools is challenged on the ground that he had no jurisdiction to impose any lesser penalties after the order of termination has already been implemented

No counter-affidavit was filed in this case on behalf of the Managing Committee, opposite-party no 4, the Manager, opposite-party no 5 and the Principal of the College, opposite-party no 6 A joint counter-affidavit was filed on behalf of the Deputy Director of Education, opposite-party no 1, and the District Inspector



of Schools, opposite-party no 2 At the time of arguments also no one came forward to defend the petition on behalf of opposite-parties 4 to 6 and only Sri Umesh Chandra argued the appeal for opposite-parties 1 and 2 In so far as the relief of *certiorari* with regard to the order of the Deputy Director of Education (Ann 19) is concerned the question that arises in this petition is whether the Deputy Director of Education had jurisdiction to accord approval of the resolution of the Managing Committee proposing termination of the petitioner's services on the facts placed before this Court It is well established that the Managing Committee had passed a resolution in its meeting of 19th May, 1968 proposing termination of the petitioner's services and that this resolution was forwarded for approval to the District Inspector of Schools on 4th June, 1968 Averment to this effect made in para. 24 of this petition is admitted in para. 20 of the counter-affidavit of opposite-parties 1 and 2 Para 25 of the writ petition further contains the averment that the Managing Committee, opposite-party no 4, stopped payment of petitioner's subsistence allowance with effect from 19th May, 1968 treating the petitioner's services as already terminated with effect from the said date and entry to this effect was also made in the College pay roll against the petitioner's name The opposite-party in the counter-affidavit has pleaded ignorance about this averment and no one has come forward on behalf of the Managing Committee to refute these allegations. This part of the petitioner's case is substantiated by the contents of Ann 14 and the letter of the District Inspector of Schools to the Manager of the College. In this letter the District Inspector of Schools spoke of the resolution of the Managing Committee dated 19th May, 1968 proposing termination of the petitioner's services and the same being forwarded to him for approval and also refers to a letter of the

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Managing Committee dated 17th August, 1968 where it was admitted that payment of suspension allowance of the petitioner had been stopped. It is clear from these facts that although the Managing Committee in its meeting of 19th May, 1968 passed a resolution proposing termination of services of the petitioner, that resolution was treated as a resolution terminating the petitioner's services forthwith and the services of the petitioner were actually treated as terminated forthwith after passing of the resolution and the suspension allowance was suspended and a note made in his service record to the effect that his services have been terminated. The resolution of 19th May, 1968 passed against the petitioner is reproduced in para 40 of the petition. The petitioner claims to have come to know of the terms of this resolution from the memorandum of appeal filed by the Managing Committee before opposite-party no 1. In para 32 of the counter-affidavit the opposite-parties did not contest that the resolution was passed by opposite-party no 4 in terms given in para 40 of the petition, although they were in a position to dispute it if the resolution was contained in the memorandum of appeal of opposite-party no 4. I am, therefore, entitled to proceed on the basis that the resolution was passed in the language in which it is reproduced in para 40 of the writ petition. The resolution reads as follows:

"It is noted that Sri B. D. Sharma, Lecturer (under suspension) has been extended all facilities and opportunities to submit his defence and to appear for oral enquiry but he has failed either to submit any defence during the last sixteen months or appear for oral enquiry before the Inquiry Officer.

An opportunity was also given to him to appear before the Managing Committee today for oral

hearing but he has not cared to come today also The Committee is of the opinion that the charges which are very grave, stand fully established and the recommendations of the Inquiry Officer regarding removal of Shri B D Sharma may be enforced according to rules and a report sent to the District Inspector of Schools Lucknow for approval "

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It appears, therefore, that the Managing Committee resolved that the petitioner should be removed from service and directed that the order of removal should be enforced and the fact reported to the District Inspector of Schools for approval The resolution in substance, therefore, was one for removal of the petitioner and for reporting the fact to the District Inspector of Schools. In other words, the Managing Committee had reported that removal of B D Sharma should be effected before a report of this fact is sent to the Inspector of Schools and, therefore, the clear implication was that removal of the petitioner should be affected prior to moving the District Inspector of Schools for approval If it amounted merely to a proposal for removal of B D Sharma then the resolution would not have directed enforcement of the recommendation for removal and instead would have directed that the proposal for his removal should be sent to the District Inspector of Schools for approval The fact that the resolution directed the submission of a report to the District Inspector of Schools and not the submission of a proposal for approval appears to be amenable only to the interpretation that the Committee had resolved to remove the petitioner from service prior to the approval of the District Inspector of Schools This interpretation of the resolution is supported by the twin circumstances that the suspension allowance of the petitioner was stopped with effect from the date of passing of the resolution and an entry was

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made in the service record of the petitioner to the effect that his services had been terminated. It is in this way that the recommendation for removal appears to have been enforced, as required by the resolution. After stoppage of the allowance the petitioner actually sent a representation to the Manager drawing his attention to the fact that the payment of his allowance had been stopped and soliciting an order of payment in case his services had not been treated as terminated. If there was any substance in the submission made in arguments for the opposite parties that the petitioner's allowance may have been suspended under a mistake or without authority of the Managing Committee then a note in the petitioner's service record that his services had been terminated would not have been made and when the petitioner moved the Manager by representation, orders would have been passed by the Managing Committee with the clarification that the petitioner was not being removed from service unless approval of the District Inspector of Schools was obtained. In substance and in effect, therefore, the resolution was one for removal of the petitioner from service with immediate effect. S 16-G(3)(a) contains a prohibition against the discharge, removal or dismissal from service of a Principal, Head Master or a teacher except with prior approval in writing of the Inspector. The above facts clearly disclose removal of the petitioner from service by the Managing Committee without prior approval of the Inspector, which was clearly in breach of this provision and, therefore, illegal. S 16-G(3) of the Act has been enacted to protect a Principal, Head Master or teacher against highhandedness by the Committee of Management and, therefore, they have been prohibited from discharging, removing or dismissing from service the Principal, Head Master or teacher without obtaining prior approval of the Inspector. When this prohibition has been disregarded

and contravened, the question arises whether the management of educational institutions can ask for approval after the removal or dismissal of the teacher has been actually effected. The answer must clearly be in the negative. The Inspector has no jurisdiction to approve the removal, discharge or dismissal of a Principal, Head Master or teacher if it has already been made without obtaining prior approval. This is so because s 16-G(3)(a) uses the phrase 'prior approval of the Inspector and not just 'approval'. If the word 'prior' was not there then approval to the action of the Managing Committee could be accorded by the Inspector or the Deputy Director of Education even subsequent to the act of the Managing Committee, but because s 16-G provides for prior approval, approval cannot be granted subsequently. If the Principal, Head Master or teacher has already been discharged, removed or dismissed or a notice of termination has been issued to him by the Managing Committee the Inspector is confronted with a *fait accompli* and there is nothing left to approve. As in my view the petitioner had already been removed from service, the Deputy Director of Education had no jurisdiction left in him to accord approval to the resolution which was forwarded by opposite-party no 4. Consequently, his order of which Ann 19 is a copy is invalid in law in so far as it disposed of appeal of opposite-party no 4.

In *Dr M L Vidyarthi v. The Board of Management, D S N College, Unnao* (1), this Court under similar circumstances held that resolution of a Managing Committee terminating the petitioner's services with immediate effect could not be subsequently approved by the Inspector. Similar view was taken in the case of *Beulah Cutting v The Chairman, Board of*

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(1) W P, no 498 of 1970, dated 18th April, 1973.

1973 *High School and Intermediate Education, Uttar Pradesh, Allahabad* (1) and *Municipal Board, Bareilly v. B K Mehrotra* (2) On behalf of the opposite-parties reliance was placed on the case of *Managing Committee v Indrapal Gupta* (3) In that case it was held that the resolution of a Managing Committee taken effect only on approval to the resolution being accorded by the Inspector under s 16-G This case does not assist the opposite-parties as it only decided the point of time when the resolution of termination, discharge or dismissal of a teacher takes effect and did not deal with the question which is before us, namely, whether the Inspector has jurisdiction to grant subsequent approval to a resolution of discharge, removal or termination, which has already been enforced or when the services of a Principal, Head Master or teacher have already been terminated.

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I hold, therefore, that the approval by the Deputy Director of Education to the removal of the petitioner from service was without jurisdiction and illegal in view of s 16-G of the Act and, therefore, liable to be quashed The petitioner has not been removed from service lawfully and must, therefore, be treated as still a Lecturer in Mathematics in the Mansadın Shukla Intermediate College, Lucknow As to Ann 17 the only ground pressed in arguments from the side of the petitioner was that the order of punishment could not be passed by the Inspector inasmuch as the petitioner had already been removed from service by the Managing Committee This argument does not appear to be valid because petitioner's removal being in breach of s 16-G was illegal and the Inspector had jurisdiction under sub-s (b) of s 16(3) of the Act to approve or disapprove or reduce or enhance the punishment proposed by the management There is, therefore, no case made out for quashing of Ann 17

(1) 1966 A L J 58

(2) 1968 A L J 1127

(3) 1973 A L J 486

The petition is allowed to this extent only that the order of the Deputy Director of Education, opposite-party no 1, dated 12th February, 1970 of which Ann. 19 is a copy, is quashed. Let *certiorari* issue accordingly. The opposite-parties are commanded to treat the petitioner as still a Lecturer in Mathematics in the Mansadin Shukla Intermediate College, Lucknow. Let *mandamus* issue accordingly. Rest of the reliefs claimed in the petition are rejected. The petitioner shall get costs of this petition from the Managing Committee, opposite-party no. 4.

*Ordered accordingly.*

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## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr Justice K N. Seth*

NAGAR MAHAPALIKA,  
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AMAR PAL SINGH

RESPONDENT.

**U. P. Tenancy Act, (1939) ss 29 and 30(3)—Land acquired for trenching and sanitation—Leased out for 15 years—No accrual of hereditary rights in such land**

Cl (3) of s 30 of the U P Tenancy Act provides that hereditary rights shall not accrue in land acquired or held for a public purpose. If the land was acquired under the Land Acquisition Act it was acquired for a public purpose and fell within the purview of cl (3). It is to be noted that the phrase "acquired or held" shows that it is not necessary that the land which was acquired for a public purpose must continue to be held for that purpose. In such land hereditary rights could not accrue.

Special Appeal no 899 of 1969 connected with Special Appeal no 900 of 1969 against the judgment and

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decree of H. C. P. TRIPATHI, J. dated 30th April, 1969  
in Civil Miscellaneous Writ Petition no 3 of 1964

*N D Pant*, for the Appellant

*G N Verma*, and *K N Tripathi*, for the Respondent

S CHANDRA, J. —The Nagar Mahapalika, Allahabad, instituted a suit for the ejectment of the respondent under s 175, U P Tenancy Act. Its case was that it had let out the land to the respondent under a deed of lease dated 5th June, 1945 for a period of 15 years. The period had expired and the Mahapalika wanted possession of the land for its own use. The suit was contested on the ground that the defendant had acquired hereditary tenancy rights. It was also pleaded that the Court had no jurisdiction to try the suit and that the Zamindari Abolition Act applied to the land in suit on which the defendant had become *sirdar*.

The trial court held that the land was acquired by the Mahapalika under the Land Acquisition Act in 1915 for a public purpose for the trenching ground of the Allahabad Municipality. The acquisition came within the purview of cl (c) of s 8 of the Municipalities Act and so it fell within cl (d) of s 30 of the U P Tenancy Act whereunder hereditary tenancy rights could not accrue in such land. It was also held that the land having been acquired for a public purpose, it fell within the purview of cl (3) of s 30 and for that reason also the land was outside the purview of s 29. On this ground also hereditary tenancy rights did not accrue to the defendant. The trial court observed that the only ground on which jurisdiction was challenged was that the land lies in city area within municipal limits, hence U. P. Tenancy Act does not apply.



and the Court had no jurisdiction to try the suit under s 175 of the U P Tenancy Act. The trial court found that the land in dispute being within municipal limits, the Zamindari Abolition Act did not apply. It was held that the defendant was a non-occupancy tenant liable to be ejected. On these grounds the suit was decreed.

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The defendant went up in appeal. The only point argued in appeal was that the defendant acquired hereditary tenancy rights under s 29 of the U P Tenancy Act. The Additional Commissioner repelled this submission. He held that the land having been acquired under the Land Acquisition Act was acquired for a public purpose and so s 30(3) clearly applied and no hereditary tenancy rights accrued. The appeal was dismissed. The respondent then filed a second appeal before the Board of Revenue. The same was dismissed summarily. There also the only point urged was as to the applicability of s 30 of the U. P Tenancy Act.

The defendant-respondent then instituted a writ petition in this Court. In the body of the writ petition nothing was stated in respect of the question of jurisdiction of the trial court to entertain the suit. At the hearing of the writ petition it appears to have been argued that the U P Zamindari Abolition and Land Reforms Act applied to the land in dispute and so the suit under the U P Tenancy Act was not maintainable. A learned single Judge held that there was nothing on the record to suggest that on 7th July, 1949, the village where the land in dispute was situate was comprised in the municipal area of Allahabad. Therefore the exception in s 2(1) of the Zamindari Abolition Act was not applicable. He also found that there was nothing to show that the land in question

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was included in the municipal trenching ground so as to apply the exception contained in s 2(1)(c) of the Act. On these findings it was held that the suit was not maintainable under the Tenancy Act because that Act had been repealed by the Zamindari Abolition Act. The writ petition was allowed and the impugned orders were quashed. Aggrieved, the Nagar Mahapalika has come up in appeal.

It will be seen that the defendant himself had taken up the case before the trial court that the land in dispute was situate within municipal limits. It was on this ground that the trial court held that the Zamindari Abolition Act will not apply and the plea of jurisdiction was negatived. This finding of the trial court was not challenged either in appeal or second appeal. The judgment of the learned Additional Commissioner specifically mentions that the only point urged before him related to ss. 29 and 30 of the U. P. Tenancy Act. In the body of the writ petition also it was not pleaded that in fact the plots in dispute were outside the municipal limits as they stood on 7th July, 1949. In this background it was not open to the respondent to raise the question that the land in dispute was not situate within municipal limits on 7th July, 1949 for the first time at the hearing of the writ petition. The learned single Judge has mentioned nothing which may have impelled him to deviate from the well settled principle that a question of law which requires investigation of facts cannot be permitted to be raised for the first time in appeal or even in a writ petition. It is all the more so when the plea of jurisdiction was taken in the trial court and when it was negatived by that Court, the plea was abandoned in appeal. It is equally settled that a point which has been abandoned cannot be permitted to be reagitated at a subsequent appellate stage. We are hence unable to sustain the order

of the learned single Judge that the suits were not maintainable.

The next question argued on behalf of the defendant-respondent was that he had acquired hereditary rights under s 29 of the U. P. Tenancy Act. The Municipal Board had let out the land to the defendant for a fixed term of 15 years. *Ex facie*, the respondent would acquire hereditary tenancy rights under s 29. S 30 engrafts a statutory exception. It provides that

“Notwithstanding anything in s 29, hereditary rights shall not accrue in—

.... .

(3) land acquired or held for a public purpose or a work of public utility; and in particular, and without prejudice to the generality of this clause—

.....

(d) lands acquired . . . by a municipality for a purpose mentioned in cl (a) or cl. (c) of s 8 of the United Provinces Municipalities Act, 1916 . . . ”

Cl (3) of s 30 provides that hereditary rights shall not accrue in land acquired or held for a public purpose. In the present case the land was acquired under the Land Acquisition Act. Clearly, it was acquired for a public purpose. It fell within the purview of cl (3).

The second part of cl (3), namely “and in particular, and without prejudice to the generality of this clause” is illustrative of acquisitions for public purposes. The kinds of acquisitions mentioned in cls (a) to (g) are illustrative of lands being acquired or held for public purposes. It is to be noted that the phrase “acquired or held” shows that it is not necessary that

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H SWARUP, J.:—This appeal has been filed by Trine Holst Thomsen against the order of the First Additional District Judge, Allahabad dismissing her application under s 7 of the Guardians and Wards Act for being appointed guardian of the person of the minor girl Km. Chaitali. The appellant is a resident of Denmark. She wished to take under her guardianship a minor Indian girl and for that purpose approached the respondent. The minor is reported to be an orphan living under the care and custody of the respondent the Children's National Institute, Swaraj Bhawan, Allahabad. Learned counsel appearing for the Institute has stated that the minor is an orphan and the Institute has no knowledge about her parents, relations or religion. The Institute, he has further stated, has no objection to the appellant being appointed as the minor's guardian.

The trial court has dismissed the application on the ground that on the material available on the record, it was not established that it would be for the "well being of the minor" that the applicant be appointed her guardian. Learned counsel for the appellant contended that the affidavits had been filed in the trial court and on the basis thereof, the court below should have come to the conclusion that it would be for the welfare of the minor to appoint the appellant as the guardian. The affidavit has been sworn by the Notary Public in Denmark. S 14 of the Notaries Act, 1952, provides:

"14 *Reciprocal arrangements for recognition of notarial acts done by foreign notaries*—If the Central Government is satisfied that by the law or practice of any country or place outside India, the notarial acts done by notaries within India are recognized for all or any limited purposes in that country or place, the Central Government may,

by notification in the official *Gazette*, declare that the notarial acts lawfully done by notaries within such country or place shall be recognised within India for all purposes or, as the case may be, for such limited purposes as may be specified in the notification."

Although time was granted, the necessary notification has not been produced and it has not been shown that the affidavit sworn in Denmark is admissible in guardianship proceedings in Courts in India. Only a telegram sent by the Ambassador of Denmark in India to the respondent opposite-party in this case has been produced which states that "according to principles in Danish administration of justice there is reciprocity between Indian and Danish documents during a pending court case in Denmark". The telegram however, cannot be treated as evidence. But, even if all the facts stated in the affidavit are taken as established, no case has been made out for the appointment of the appellant as guardian.

The facts that have been asserted are that the appellant is a well-to-do lady having considerable income, she lives in Denmark and is interested in rearing an Indian child, and that she is willing to be appointed the guardian of the minor's person. The purpose of the application seeking the guardianship of the minor is to take the child to Denmark. The appellant has no intention of coming to India or living in India. Learned counsel contends that it may not be possible for the child to get a passport for going to Denmark to join the appellant unless the appellant is appointed a guardian of the minor's person. It is clear that the purpose of the application is primarily to secure a licence for taking the child out of India. This is certainly not the purpose for which the Court

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can be moved to appoint guardian of a minor. It is not contemplated by the Guardians and Wards Act According to Art 6 of the *Corpus Juris Secundum*, Vol 39, p 6, "a guardian cannot be appointed for minors for the purposes of having them sent immediately into a foreign country," [*Ala-Describes v Milmer* (1)], "nor will one be appointed for the sole purpose of transferring a minor's legal residence to a city so as to enable the minor to obtain gratuitous education at the city's expense" [N Y *In re Schnipper's Guardianship* (2)] It is thus evident that the Courts do not appoint guardians only to let the child secure a passport or for getting charitable education or help

The purpose of appointment of a guardian by a Court under the Guardians and Wards Act is to protect the child and not to grant a licence for taking the child out of the country As put by BENNETT, J *in re. D Infants* (3), "the jurisdiction is based upon the need of an infant for protection which, in my judgment, having regard to the authorities gives this division of the court jurisdiction to appoint a guardian" This view finds support from the speech of Lord LANGDALE in *Johnstone v Beattie* (4), where Lord LANGDALE observed "Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England The whole property of an infant may be situate in a foreign country and tutors and curators of the person and estate of the infant may have been duly appointed according to the law of the country where the property is , and yet it may be evident that without the authority of a guardian duly appointed here and subject to the control of the Court of Chancery the infant

(1) 69 Ala. 25 14 Am R 501  
 (8) 1948 (2) All E R 411

(2) 268 N Y S 302 149 Misc 905  
 (4) (1888) 10 Cl and Fin H L.

may be without the protection which may be absolutely necessary for its welfare and even for its safety" Although it is the question who directly protects the minor the ultimate responsibility remains with the Court, when it appoints a guardian

It cannot be disputed that Court appointing guardian is vitally concerned with the protection of the child How can a Court protect a child which does not remain within its jurisdiction? It is for this reason that s. 26 of the Guardians and Wards Act provides.

"26 (1) A guardian of the person appointed or declared by the Court . . . , shall not without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed

(2) The leave granted by the Court under sub-s (1) may be special or general, and may be defined by the order granting it."

The clear intention of the law is that a minor for whom the Court appoints a guardian should normally stay within the jurisdiction of the Court.

According to *American Jurisprudence*, Second Edn., Vol 39, p 48. Art 51, "a ward receives his status from a proceeding in rem in the probate court and becomes the ward of the court. The control of the wards' person and property remains in the probate court with discharge of the duties in respect thereof being delegated to a guardian as the agent of the court and subject to the order of the court" (Re Clendennig, 145 Ohio St 82). What is true for a guardian appointed by a Probate Court will also be true for a guardian appointed by an Indian Court under the Guardians and Wards Act. Even after appointing a

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guardian the Court retains the jurisdiction for all purposes connected therewith. It is for this reason of protecting him, whenever the need be, that the ward is required to remain within the jurisdiction of the court which appoints a guardian for him. The purpose will be frustrated if the ward goes permanently out of court's jurisdiction.

S. 39 of the Guardians and Wards Act also supports this view. It mentions various cases in which the guardian appointed or declared by the Court may be removed. One of the conditions is given in cl. (h) which provides—

“for ceasing to reside within the local limits of the jurisdiction of the Court.”

This shows that intention of the Legislature that a guardian should also normally reside within the local limits of the jurisdiction of the Court. This is essential because without it the Court will be powerless to exercise control over him and thereby protect the interests of the minor. A Division Bench of this Court in the case of *Asghar Ali v. Amina Begam* (1) expressed the view that the guardian to be appointed should reside within the jurisdiction of the Court to which he makes the application. It was observed: “we might also refer to cl. (h) of s. 39 of the same Act, which shows that the Legislature contemplates that an applicant for guardianship should reside within the jurisdiction of the court to which he makes the application.” This view was however in a later case considered as expressed *obiter dicta* by one of the learned Judges who decided the case of *Beni Prasad v. Mst. Parwati* (2). The Bench in that case was of the opinion that there was nothing in law to prevent a person not residing within the jurisdiction of the District Judge within whose

(1) (1914) I L.R. 36 All. 280

(2) AIR 1988 All. 780.



jurisdiction the minor ordinarily resided and had property, from being appointed guardian of his person and property. It was taken that cl (h) of s 39 of the Act was only a ground for removal and not a bar to appointment. It may be that the law does not prohibit a Court from entertaining an application for appointment as guardian, of a person not residing within the jurisdiction of the Court, but it will not be a sound policy to appoint such a person as guardian over whom the Court may have no control.

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Admittedly, the appellant resides in Denmark and, as seen earlier, has no intention of coming to India to reside within the jurisdiction of the District Court. Although a formal application has not yet been made for permission to remove the child out of Court's jurisdiction, but it is bound to be made immediately after the appellant is appointed the guardian; and, if permission to take the child out of the jurisdiction of the District Judge will not be granted, the appointment of the guardian will be of no avail as then the appellant will not be able either to watch the minor's interest or look to her welfare. As the appointment cannot be made for the purpose of letting the child leave the country and consequently the Court's jurisdiction, there can be no justification to appoint the appellant guardian of the minor.

Learned counsel for the appellant urged that the refusal to appoint the appellant guardian of the minor may have the consequence of preventing the minor from going out of India and having a life of greater comfort. The contention has no merit. Dismissal of an application under s. 7 of the Act cannot amount to any preventive order. It does not prohibit the minor from going out of the country. If the Government of India grants the passport and the Government of Denmark grants the visa, the child can go. The Court's

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order dismissing the application cannot come in the way.

The appeal accordingly fails and is dismissed. As no one has opposed this appeal, there will be no order as to costs.

*Appeal dismissed*

## CIVIL REVISION

*Before Mr Justice S Malik*

GOPAL LAL AND ANOTHER

APPLICANTS,

*v.*

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RAM KARAN SINGH

RESPONDENT.

**Code of Civil Procedure, 1908 O XXI, r 103 and Limitation Act, 1963, Art 98—Suit under O 21, r 103 filed within one year from final order of High Court in revision—Suit within limitation**

Where a revision application against an order passed by the execution court on 24th October, 1964 had been admitted and was finally decided after hearing both the parties on 3rd May, 1967 held, that the period of limitation for a suit under O 21, r 103, C P C, must be deemed to have started running from the date the revision application was decided and a suit filed within one year as provided by Art 98 of the Limitation Act would be within time.

Civil Revision no 1023 of 1969 from the order dated 6th May, 1969 passed by Raman Prakash, IV Additional Munsif, Varanasi.

*Babu Ram Avasthi*, for the Applicants.

S MALIK, J —This is an application in revision against the finding recorded by the IVth Additional Munsif, Varanasi, in a suit filed under O XXI, r 103 of the Code of Civil Procedure on issue no 2 relating to limitation.

In short, the relevant facts are that the applicants-decree-holders sought to execute their decree in respect of a house. The opposite-party, Ram Karan Singh obstructed execution of the decree whereupon the decree-holders filed an application before the execution court under O XXI, r 97, Civil Procedure Code and Ram Karan Singh filed objections under cl (2) of r 97. The executing court allowed the application under r 98 of O XXII, Civil Procedure Code rejecting the objections raised by Ram Karan Singh claiming that in accordance with r 99 of O XXI of the Code of Civil Procedure the application should be rejected. The said order was passed by the execution court on the 24th of October, 1964. The present applicants came up to this Court against that order by filing a revision under s 115, Civil Procedure Code which was admitted and later dismissed on merits after hearing the parties on 31d May, 1967. The suit under O XXI, r 103, Criminal Procedure Code was filed thereafter on the 11th of May, 1967.

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The only question involved in this application is whether the suit under O XXI, r 103, C Procedure Code should have been filed within a year from 24th October, 1964 i.e. the date of the order passed by the execution court allowing the decree-holders' application filed under r 97 of O. XXI, C Procedure Code and refusing to dismiss it in accordance with r 99 or within one year from the date on which the revision application filed by the applicants was rejected. If it is held that the suit under O XXI, r. 103, C Procedure Code should have been filed within a year from 24th October, 1964, the suit obviously was time-barred. On the other hand, if the period of limitation should be deemed to have started running with effect from the date of the dismissal of the revision appli-

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cation i e 3rd May, 1967, then the suit was filed obviously within the period of limitation

The learned counsel for the parties were heard at length and my attention was drawn not only to the provisions of Art 98 of the Limitation Act, specially, the words 'final order' but also to the observations made by the Travancore-Cochin High Court in the Case *Govinda Menon Raman Menon v Krishna Pillai Kesaya Pillai* (1), *Smt Meghmala Debi v Saday Parhya* (2) and also by the opposite-party to *Koppolu Venkataswami v Uttarkar Sara Bai* (3) and two decisions of the Supreme Court reported in *State of Madras v Madurai Mills Co Ltd* (4) and *Shankar Ram Chandra Abhyankar v Krishnaji Dattatraya Bapat* (5).

The Calcutta High Court while considering the provisions of Art. 11-A of the old Limitation Act of 1908 held:

"Suit under O XXI, r 103 is governed by Art 11-A, Limitation Act and the word 'order' in Art 11-A should be construed as meaning the final or subsisting order in the case. The period of one year runs from the time when the appellate Court passed its order. A somewhat different consideration would apply if a revision petition presented by an unsuccessful party in a claim proceeding is rejected by the superior Court. If the High Court in exercise of its powers under s 115, Civil Procedure Code refuses to interfere in a claim case, it merely amounts to an abstention from exercising jurisdiction and the final order that remains subsisting is the order passed by the trial Court. It may be otherwise where the High

(1) A I R. 1955 Tra. Co 51 (2) A I R. 1938 Cal 577  
 (3) A I R. 1943 Mad 638 (4) A I R. 1967 S C 681  
 (5) A I R. 1970 S C 1.

Court interferes in revision with the original decision."

Similarly, it was held by a Full Bench of the Travancore-Cochin High Court that for a suit under Art 11-A, Limitation Act time runs from the date of the order of the execution court rejecting objection to delivery and not from the date of the order passed on an infructuous and incompetent appeal or revision against the order.

It was argued that the matter would have been different, had the revision application been allowed by this Court. As the revision application was rejected, it was argued, it is apparent that this Court refused to exercise its jurisdiction and, therefore, the only final order which remained, was that of the execution court passed on 24th October, 1964. It would follow from the contention put forward that an applicant who comes to this Court by filing a revision application against an order of the execution court passed under r 98 of r 99 of O. XXI of the Code of Civil Procedure would remain in the dark as to whether the period of limitation would have run out or not till the revision application has been decided as in most cases it takes more than a year to dispose of a revision application and in case ultimately the revision application is rejected and more than a year has passed, it would have meant that a suit under O. XXI, r. 103 of the Code of Civil procedure, if filed would have become time-barred. On the other hand, if the applicant succeeds in the revision application, the other party would get a fresh period of limitation of one year for filing the suit. It is doubtful if the Legislature really intended such uncertainty in case the aggrieved party came up in revision to this Court.

On behalf of the opposite-party it was argued that the words 'final order' appearing in Art 98 of the

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Limitation Act (new) would mean either the order passed by the execution court in case it was not challenged before the High Court or the order passed by the High Court, as in this case, in a revision application whether the revision application was dismissed or not as the order of the execution court must be deemed to have merged in the order of the High Court whether dismissing or allowing the revision application. In support of this contention the learned counsel for the opposite-party relied on the decisions of the Supreme Court and of the Madras High Court as already mentioned. In the case cited it was observed by the Madras High Court at p 637 as under

"It will be noted that even in a civil revision petition, it is clear that if the High Court passed an order allowing the revision and held against the respondents in the revision petition, the party who was unsuccessful before the High Court would have to file a suit within one year from the date of the High Court's order. Therefore, if the real reason for holding that in the case of an appeal, the starting point should be the date of the appellate order is that the appeal is a continuation of the proceedings of the trial Court, the same reasoning should apply in the case of a civil revision petition and there is no reason why a different construction should be applied in the case of a civil revision petition. I am aware that a different view has been expressed in some judgments and I would say, speaking for myself, that there is much to be said in favour of the view that under Art 11, Limitation Act, the starting point should be taken to be the date of the final order, whether that order was passed on an appeal from that order or whether it was passed in a civil revision petition from that order."

In *State of Madras* case (1) it was observed in para. 6 as follows:

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"But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. It was observed by this Court that the order of registration made by the Income-tax Officer did not merge in the appellate order of the Appellate Commissioner, because the order of registration was not the subject-matter of appeal before the appellate authority."

It is clear from the observations quoted and a perusal of the ruling cited that it was held by the Supreme Court that the order of an inferior Court or Tribunal would merge in the order or judgment of a superior Court or Tribunal where the question decided by the first Court or the inferior Tribunal was decided in an appeal or revision by the superior Court or Tribunal.

Similarly, in *Shankar Ram Chandra's* case (2) it has been observed as under:

"Where, on its revisional jurisdiction being invoked against the order of the appellate Court .

, High Court dismisses the revision, after hearing both the parties, the order of the appellate Court becomes merged with the order made in revision. . . ."

(1) A.I.R. 1967 S.C. 681.

(2) A.I.R. 1970 S.C. 1.

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It was also observed in that case by the Supreme Court as follows

“The right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. S. 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court.”

As has already been pointed out, the questions raised in the revision application before this Court which was dismissed on 3rd May, 1967, were the same as were disposed of by the execution court by its order dated 24th October, 1964 against which the revision application was filed. It has also been pointed out that the revision application had been admitted and was finally decided after hearing both the parties. Under the circumstances, in view of what has been discussed, it is apparent that the order passed by the execution court must be deemed to have merged with the order passed by this Court disposing of the revision application and the period of limitation, therefore, must be deemed to have started running from the date the revision application was decided by this Court. I am, therefore, of the view that the lower court rightly held that the suit under O XXI, r. 103 of the Code of Civil Procedure was filed



within the period of limitation under Art 98 of the Limitation Act

The revision application is dismissed with costs

*Revision allowed*

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## APPELLATE CRIMINAL

*Before Mr. Justice K. B. Saxena and Mr. Justice  
S. K. Sinha*

ABDUL HABIB

APPELLANT,

v

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RESPONDENT

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August 16

**Code of Criminal Procedure, 1898, s. 50—Arrest by private person—Words “In view of”—Meaning of—Arrest by person in whose presence offence was not committed—Right of**

A private individual may arrest a person only when—(1) he is a proclaimed offender, or (2) he, in his view commits a non-bailable and cognizable offence. The essential thing is that the offence must be committed in his view. The words “in his view” mean “in presence of” or “within sight of” and not “in his opinion” or “on his suspicion” or “on receipt of information”.

The right to arrest accrues not on the basis of opinion, suspicion or information but on the basis of his visual knowledge that is to say, on the basis of his own personal knowledge derived from the use of his own eyes in seeing the crime being committed.

**Arms Act, 1959 ss. 25 and 25(1)(b)/1—Offence under—Bailable—Accused noticed running with a unlicensed knife—Right of private person to arrest the accused—Code of Criminal Procedure 1898 Sch. II, col. 5**

An offence under s. 25 of the Arms Act will be non-bailable if it is in relation to a fire arm but if it is in relation to any arm other than fire arm, the offence would be bailable. As such private person had no right to apprehend the accused. S. 20 of the Arms Act is inapplicable to the facts of the case.

While sitting at Lucknow.

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**Indian Penal Code, 1860, s 100 (sixthly)—Right of private defence to cause death—Clause (sixthly)—Applicability of—Necessary facts to be proved**

For the applicability of s 100 (sixthly), there must be proof of the following facts, namely

- (i) There must be an assault,
- (ii) That assault must be with the intention of wrongful confinement,
- (iii) Such an assault must be made under the circumstances which may reasonably cause a person to apprehend that he will be unable to have recourse to the public authorities for his release,
- (iv) All the three must co exist, and
- (v) Even if all these four exist, the act must fall under the restrictions mentioned in s 90

Criminal Appeal no 596 of 1970 against the judgment and order dated 5th December, 1970 passed by B D MATHUR, Sessions Judge, Lucknow in S T no 216 of 1970

None appeared for the appellant

S N Trivedi, for the State

K B SRIVASTAVA, J —The appellant Abdul Habib has been convicted under s 302 of the Indian Penal Code, and sentenced to undergo imprisonment for life. This appeal is directed against that conviction and sentence.

The prosecution case, in brief, is as follows

One D1 Kapur, in the Army Medical Corps, was posted at Lucknow and was occupying the Payagpur house as his residence. Sarwan Singh (P W 13) was also in Army service and one of his duties was to carry Army *dak* to the residence of D1 Kapur. He went to deliver the *dak*, as usual, at about 4.45 p.m., on 17th January, 1970, and after parking his cycle outside the house, delivered the *dak* to him. While he was about to return after delivering the *dak*, he noticed the appel-

lant mounting his cycle and attempting to run away Sarwan Singh challenged the appellant to stop and intercepted the flight by catching hold of his cycle. The appellant thereupon whipped out a knife and gave a stab blow near the right elbow and then leaving the cycle aside, took to his flight. Sarwan Singh raised a hue and cry and many persons joined in the pursuit of the fleeing appellant. They were raising a slogan that the appellant should be arrested. Bhimsen Mehta (P W. 1) and his son Naresh Kumar, a young lad, aged about 18 years, were standing near a Pan shop, situate in the close vicinity of Narang Building, on the Ashok Marg, in the city of Lucknow, when the appellant emerged from the Naihi Galla Mandi lane and started running on the Ashok Marg, brandishing a knife, and continued his flight in the direction of the Narang Building. The slogan that was being raised by the pursuers, was heard by Naresh Kumar who advanced towards the appellant with the intention of apprehending him but the appellant, in order to evade his arrest, struck a blow by his knife and stabbed him in his abdomen and repeated the blow and stabbed him on the buttock also. In the meantime, Bhimsen Mehta and those pursuing the appellant apprehended him, but not before the appellant had been given a large number of blows to disable him from further flight. A N. Das (P W 5) took the injured Naresh Kumar to the Civil Hospital. Bhimsen Mehta dictated his F I R. to Sant Bux Singh (P W 4) and thereafter he and several others took the appellant, and the knife Ex 1 recovered from him, to police station Hazratganj, where Bhimsen Mehta got his F I R registered at 5 20 p m.

The investigation was made by S I B D Sharma (P W 11) who recorded the statements of Bhimsen Mehta, Raj Kumar Gulati and Ram Swaroop P Ws 1 to 3 and of several others at the police station. The

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injuries of Naresh Kumar were examined by Dr. Yadu-  
 bin Saran Das (P.W. 12) at the Civil Hospital at 5.10  
 p.m. and he was found to have received the following  
 injuries

(1) Incised wound  $1'' \times \frac{1}{2}'' \times 1\frac{3}{4}''$  deep starting  
 from the medial side and going laterally  $5\frac{1}{2}''$  be-  
 low the left nipple,

(2) Incised wound  $1'' \times \frac{1}{2}'' \times 1\frac{3}{4}''$  starting super-  
 iorly and going inferiorly on the left buttock, and

(3) Abrasion  $\frac{1}{2}'' \times 1/10''$  on the middle and ver-  
 tical surface of the left ring finger

His condition was petty low and, therefore after 10.30  
 p.m. he was sent to the Medical College. He died on  
 20th January and then his autopsy was held by Dr. S. B.  
 Lal Saxena at 1 p.m. on 20th January. He found that  
 the deceased had sustained the following ante-mortem,  
 external and internal injuries

#### *External injuries*

(1) Stitched wound 10'' with 26 stitches,  $9\frac{1}{2}''$   
 below the inner part of the left clavicle on the left  
 side of the abdomen extending up to lower abdo-  
 men,

(2) Stitched wound  $6\frac{1}{2}''$  with 16 stitches on the  
 left side of the lower chest joining injury no. 1. 7''  
 below left nipple,

(3) Stitched wound 1'' with two stitches on the  
 left buttock,

(4) Superficial cut  $1\frac{3}{4}'' \times$  linear on the right but-  
 tock, and

(5) Three abrasions in an area of  $5\frac{1}{2}'' \times 2\frac{1}{2}''$  on  
 the inner aspect of upper right leg

#### *Internal injuries*

There were stitched wounds on the left side of the  
 chest, on the pleura, diaphragm, abdomen, peritoneum

and the greater curvature of the abdomen. Death, in the opinion of Dr. Saxena, was due to shock and internal haemorrhage as a result of the injuries sustained.

The appellant had also received injuries during the course of his arrest. These were examined by Dr. B. D. Srivastava (C W 1) at 5.20 p.m., on 18th January after the appellant had been admitted inside the jail. These injuries are as follows:

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- (1) Abraded contusion  $3'' \times \frac{3}{4}''$  on the back of the right upper arm in the lower part,
- (2) Contusion  $1\frac{1}{2}'' \times \frac{1}{2}''$  on the back of the right upper arm in the middle part about  $\frac{1}{2}''$  above injury no 1,
- (3) Multiple contusions in an area of  $10'' \times 4''$  on the right buttock and on the back of the right thigh,
- (4) Contusion  $4'' \times \frac{1}{4}''$  on the left buttock,
- (5) Contusion  $1\frac{1}{2}'' \times \frac{1}{2}''$  on the back of left side at the level of the waist,
- (6) Contusion  $2'' \times \frac{1}{4}''$  on the right side of the back in the upper part,
- (7) Contusion  $2'' \times \frac{1}{2}''$  on the middle part of the right side of the back,
- (8) Abrasion  $1\frac{1}{2}'' \times \frac{1}{4}''$  in the left nostril, and
- (9) Stitched wound  $1'' \times$  linear on the right eyebrow.

As a result of the investigation, the appellant was charge-sheeted and committed to the Court of Session. He pleaded not guilty and stated that one Bihari Lal Vaid was cremated on 17th January, 1970 and he and others had joined in the cremation. He was returning from the cremation ground at about 4.30 or 5 p.m., and passed through the Galla Mandi in Narhi when he noticed *marpit* going on between two factions. He

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stood there as a spectator but the factions suspected him to be one of the persons responsible for the *marpit* and he was attacked on that account. He immediately took to his heels in order to save himself but the people collected near the scene of the *marpit* went after him in hot pursuit, shouting that he should be arrested. The pursuers had *dandas* and knives with them. When he reached the Ashok Marg, these pursuers and others arrested him and started belabouring him with *dandas* and knives. One of the knife blows fell on his right eye-brow and the injury started bleeding. He admits that he had come running over the Ashok Marg from the Galla Mandi in Narhi and people were pursuing him. He also admits that he was arrested on the Ashok Marg and was beaten there. He further admits that Naresh Kumar was stabbed on the Ashok Marg but he is unable to say who did it and why and in what manner.

The prosecution has examined Bhimsen Mehta, Raj Kumar Gulati and Ram Swaroop P Ws. 1, 2 and 3 as eye-witnesses and Sarwan Singh (P W 13) to prove the circumstances in which the appellant had run away from Narhi Galla Mandi.

We think it better to discuss the evidence of Sarwan Singh first. He has deposed that he had gone to distribute the *dak* to the residence of Dr Kapur at about 4.30 p m., on 17th January and that on arrival at the residence of Dr Kapur, he parked his cycle outside his house and then became busy with the *dak*. As soon as he was free from distribution, he noticed the appellant attempting to run away on his cycle and he challenged him to get down and also caught hold of the carrier of the cycle but at this stage the appellant stabbed him on his right elbow with a knife and ran away. He raised an alarm which attracted the notice of several passersby

and they at once ran in pursuit of the appellant. The learned counsel appearing for the appellant has criticised his evidence on a variety of grounds. Admittedly, Sarwan Singh did not lodge any F I R., in respect of the stabbing received by him. He says that Dr Kapur took him to the Command Hospital, where his injuries were examined, but no injury report has been exhibited. He was interrogated by the Investigating Officer on 28th February, that is to say, more than a month after the murder of Naresh Kumar. The witness identified the appellant in Court even though no test identification had been held earlier. These are the main grounds on which his evidence has been criticised and the learned counsel has pressed that we should discard his evidence. He also urged that in his statement under s 161, Code of Criminal Procedure, the witness had stated that he had only challenged the appellant to get down from the cycle and not to run away with it but he added to it in his statement in Court by saying that he had caught hold of the carrier of his cycle also. We have considered these aspects of his evidence but we are not inclined to disbelieve him. Firstly, he has no enmity with the appellant and indeed, not even a suggestion was made to him of his having entertained any ill-will or hostile animus against him. The appellant was not even known to him from before that date. It is undoubtedly true that no test identification was held but that does not make the evidence inadmissible, and at best, it weakens its testamentary value. The question whether the witness was taken to the Command Hospital and examined there or not is not relevant in the murder charge against the appellant. The omission to exhibit the injury report also falls in the same line. It would have been better if all this evidence had been produced at the trial, but the failure to produce will not shake the evidence of murder, if it is otherwise reliable.

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Sarwan Singh is at best a witness on a side aspect of the case as to the reason why the appellant was running from Narhi Galla Mandi to the Ashok Marg. That fact was not challenged by the appellant himself. He has admitted in so many words that he was present in the Galla Mandi. He has further admitted that he ran away from Galla Mandi and stepped on to the Ashok Marg and continued his flight. He has again admitted that he was being hotly pursued by persons from Galla Mandi to Ashok Marg. This is what is material evidence in the case. There must have been some reason why the appellant decided to run away from Galla Mandi to Ashok Marg. He has given one reason, namely, that he was an innocent spectator at a faction fight that was taking place inside Galla Mandi and for no ostensible reason, the contestants in that fight suspected his complicity and left fighting *inter se* and made him a common enemy and chased him from there to Ashok Marg. This version does not appear to have a light of truth. We find no reason why a mere innocent spectator should be made the target of a wholly uncalled for assault. He does not say that he was aligned to one of these factions. He does not even say that anyone of the two factions knew him from before. There is no reason why they should suspect him, as he says, for his mere standing there. On the other hand, Sarwan Singh's statement is more down right and acceptable. As stated earlier, he had no axe of his own to grind against the appellant. He is not alleged or even suggested to have had any alignment or partiality for the family of the deceased. He is not branded as a police stooge. In the circumstances, therefore, in spite of the blemishes pointed out, he has impressed us as a witness of truth. We, therefore, place reliance upon his evidence and hold that the appellant had stabbed Sarwan Singh inside Galla Mandi and when he realised that he was likely



to be arrested, he took to his flight and came to the Ashok Marg. Thereafter he was not likely to walk slowly as the pursuit was still on. He had committed two offences inside Galla Mandi, namely the offence of theft and also the offence of causing hurt by a cutting weapon, that is to say, offences punishable under ss 379 and 324 of the Indian Penal Code. He was bound to escape to obtain his freedom and the people were equally bound to pursue and apprehend him, if they could.

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It is in the aforesaid background that the murder of Naresh Kumar came to be committed. His father Bhimsen Mehta is the Manager of an Icecream Factory situated in a part of the Narang Building. This building is situated towards the north of the Nawal Kishore Road, where it joins the Ashok Marg. The itinerant vendor of Pan sells that stuff in a trolley and parks it outside Narang Building. Bhimsen Mehta was standing near this Pan shop to purchase Pan and there is no wonder if his son was standing near him. He must have been standing as the murder was committed in front of the building. Bhimsen Mehta cannot be disbelieved merely because he is the father of the deceased. His evidence shows that he did not know even the appellant from before, and that presumably explains why no suggestion of any enmity were made against the witness. The only infirmity that was pointed out in his evidence was that he stated that he and others had no *danda* or a knife, and none of them wielded any such weapon to cause any injuries to the appellant and that he went further and stated that even those who had come chasing the appellant, caused no injuries to him. He had mentioned in the F. I. R. that the appellant was arrested after he had been beaten. It appears to us that possibly he is suppressing this fact. The other witnesses are certain that the appellant was beaten on the spot and

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words "in his view" mean "in presence of" or "within sight of" and not "in his opinion" or "on his suspicion" or "on receipt of information". In the instant case, the stabbing of Sarwan Singh had not taken place in the view of Naresh Kumar. True, a slogan was being raised that he should be arrested but there was no indication as to why he should be arrested, or as to what crime he had committed. Even if that fact had been mentioned, there would be no material change in the law because what Naresh Kumar had heard or would have heard was that a crime had been committed and that may well have led him to formulate an opinion or a suspicion but that would not attract s. 59 because the right to arrest accrues not on the basis of opinion, suspicion or information but on the basis of his visual knowledge that is to say, on the basis of his own personal knowledge derived from the use of his own eyes in seeing the crime being committed. We are, therefore, in agreement with the learned counsel that this element of s. 59 is missing. Again, even though the appellant was noticed running with an unlicensed knife, which is an offence punishable under s. 25 (1) (b), Arms Act, read with s. 1 of that Act, that offence is only cognizable but it cannot be said that it is non-bailable. Sch. II, Code of Criminal Procedure, mentions in col. 5, the offences which are bailable under the Indian Penal Code. With regard to offences against other laws it says that if such an offence is punishable with imprisonment for three years and upwards, but less than seven years, it would be bailable except in cases (not relating to fire arms) under the Indian Arms Act, 1878, s. 19, which shall be bailable. The Indian Arms Act, 1878 has been repealed by s. 46 of the Arms Act, 1959. However, the repeal to our mind, does not materially change the intention of the Legislature, as mentioned in col. 5 of Sch. II regarding offences against other laws. S. 19 of the old Act corresponds to s. 25. The meaning is, therefore, plain enough.

that an offence under s 25 will be non-bailable if it is in relation to a fire arm but if it is in relation to any arm, other than a fire arm, the offence would be bailable. That being so, we are of the view that Naresh Kumar had no right to apprehend the appellant. The learned Deputy Government Advocate argued that even if such a right stands negatived under s. 59, Code of Criminal Procedure, such a right vested in Naresh Kumar under s 20, Arms Act. That section, in our view, is also irrelevant to the facts of the case. It says that where any person is found carrying or conveying any arms or ammunition whether covered by a licence or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are or is being carried by him with intent to use them, or that the same may be used, for any unlawful purpose any . . . . . person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, may arrest him without warrant and seize from him such arms or ammunition. Naresh Kumar was not employed in any of the modes aforementioned and, therefore, he had no right of arrest. Further, there is no evidence to show that the knife was going to be used. We, therefore, hold that Naresh Kumar had no right of arrest under any law.

It is on the basis of these facts that the learned counsel for the appellant argued, and if we may say so, with great vehemence, that s. 100, clause (sixthly) of the Indian Penal Code had application. That section says that the right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to

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the public authorities for his release. In order, therefore, for this exception to apply, there must be proof of the following facts, namely, (i) there must be an assault, (ii) that assault must be with the intention of wrongful confinement, (iii) such an assault must be made under the circumstances which may reasonably cause a person to apprehend that he will be unable to have recourse to the public authorities for his release, (iv) all the three must co-exist, and (v) even if all these four exist, the act must fall under the restrictions mentioned in s. 99. S 349 defines "force", and "criminal force" is defined by s. 350. S 351 says as to what constitutes an offence of assault. Under that section whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Naresh Kumar is said to have heard the slogan that the appellant should be arrested, and is alleged to have run towards him, that is to say, to have made that gesture indicating that he was likely to arrest him. We, therefore, agree with the learned counsel that Naresh Kumar committed an assault or attempted to commit an assault. The question is as to what was the intention of that assault because the assault must be accompanied by an intention and that intention must be of wrongful confinement. If we judge the evidence in the background and the circumstances of the case, we cannot escape the conclusion that the intention was to apprehend and take the appellant to the police station. A large number of persons were pursuing the appellant; the appellant was running fast to elude the grasp of these pursuers; and it is at this stage that Naresh Kumar ran to contribute his own humble mite in the joint or common effort to catch hold of the appellant. Will that act of catching or

arresting amount to wrongful restraint or wrongful confinement is another matter that requires consideration. Wrongful restraint is defined by s 339 and wrongful confinement by s 340. The former means voluntarily obstructing any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed; the latter means wrongfully restraining any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. When we take into consideration these two sections, we feel that the intention was of wrongful confinement rather than of wrongful restraint. The intention was to arrest the appellant on the spot and to take him to the police station, that is to say, to permit him to move only within the limits of the place of arrest and the police station, and not outside these limits. However, we do not agree with the contention of the learned counsel that the circumstances were such that any reasonable person would have apprehended that he would not be able to secure the help of the public authorities in obtaining his release. He would have been taken to the police station. There is no evidence to indicate or suggest, much less to prove, that the intention was to confine him in a room or other place. The intention is obvious and clear to us that he was to be arrested and taken to the police station by a person who had no right either to arrest or take him to the police station and in the circumstances, therefore, the act resulted in wrongful confinement and not wrongful restraint. However, as soon as the appellant would reach the police authorities, namely, police officials who would then deal with him in accordance with the mandates of law. If he was an innocent person, he would secure his freedom and liberty; and if, on the other hand he had committed an offence, the law would have taken its own course. That being so, in the circum-

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tances aforementioned, there was no right of private defence of person whatsoever. Again, the right of private defence is not an unfettered right but is subject to the restriction contained in s 99. No one has a right to use more harm than is necessary in a given set of facts. Naresb Kumar was unarmed. He was only going to arrest the appellant and not to cause any injury to him. Indeed, he did not even cause an injury. The injuries were caused by others. In the circumstances, the appellant had no right to whip out his knife and to give not one but several blows thereby causing injuries that proved fatal. It is not even a case, where we can say that he had a right of private defence of person but he had exceeded that right. The murder committed was culpable homicide not amounting to murder.

Altogether, therefore, there is no substance in this appeal which is accordingly dismissed and the sentence awarded to the appellant is confirmed. He is in jail and shall serve out the sentence.

*Appeal dismissed*

## APPELLATE CIVIL

*Before Mr Justice J. S. Trivedi*

SALEK CHAND

.. APPELLANT,

*v.*

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. RESPONDENT.

*August, 23* Indian Limitation Act, 1908, ss 19 and 20—"Prescribed period" in s 20—Meaning—Whether payment of interest extends the period of limitation

The use of the expression "prescribed period" will mean not the period prescribed for the repayment of loan but the period prescribed for limitation of the suit and if the period means the prescribed period for the limitation of the suit. Sch. I has

to be read with s 12 of the Limitation Act and the day from which such period is to be reckoned has to be excluded. The payment of interest within the period of limitation extends the period of limitation and there is no reason why a different interpretation should be put for the "prescribed period" in the case of an acknowledgment or payment of interest than in a case of suit.

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Second Appeal no 3441 of 1965 from the judgment and decree dated 9th July, 1965 passed by J M SRIVASTAVA, II Additional Civil Judge, Meerut in Civil Appeal no 236 of 1965.

*A. B. Saran*, for the Appellant.

*R. H. Zaidi*, for the Respondent

J S TRIVEDI, J.—This second civil appeal is directed against the judgment and decree of Additional Civil Judge, Meerut dismissing the plaintiff's suit on the ground of limitation.

Plaintiff-appellant had filed a suit on 19th December, 1963 for recovery of Rs 1,700 on the basis of a bond executed on 20th December, 1967. The period of limitation was sought to be extended on the basis of payment made on 20th December, 1960. The defendant contested the suit on various grounds. The trial court held that the bond was duly executed by the defendant-respondent and the sum of Rs 20 was paid towards interest on 20th December, 1960. The trial court, however, held that the payment of interest was not within the prescribed period and as such the suit was barred by limitation. The finding of the trial court was confirmed by the lower appellate Court, hence this second civil appeal.

The only question for consideration is whether the payment of interest made on 20th December, 1960 extended the period of suit under s 20 of the Limitation Act (Old). Art. 67, Sch. I of the Limitation Act provides a period of three years for a suit, the period is to commence from the date of execution of the bond

1973 Ss 19 and 20 are relevant sections S. 19 of the Limi-  
 SALEK CHAND tation Act prescribes that:

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“Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.”

S 20 mentions that:

“Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period, by the person liable to pay the debt or legacy or by his duly authorised agent, a fresh period of limitation shall be computed from the time when the payment was so made”

The question for consideration, therefore, is whether the use of the words “prescribed period” mean the period prescribed in the First Schedule and not the period within which the plaintiff may bring his suit. It is not disputed that a suit if filed on 20th of December, 1960 was within limitation because for computing the period in the First Schedule the day from which such period is to be reckoned has to be excluded under s 12 of the Limitation Act. The use of the expression “prescribed period” will mean not the period prescribed for the repayment of loan but the period prescribed for the limitation of the suit and if the period means the prescribed period for the limitation of the suit, Sch I has to be read with s 12 of the Limitation Act and the day from which such period is to be reckoned has to be excluded. There was some difference



of opinion on the interpretation of the words "prescribed period". The difference has been set at rest by a Full Bench of this Court reported in *Firm Kamta Prasad Jagannath Prasad v. Gulzar Lal* (1) wherein after overruling the earlier cases the Full Bench laid down that the period mentioned in the third column of the First Schedule is subject to the provisions of ss. 4 to 25 of the Limitation Act. If the period mentioned in the third column of the First Schedule is subject to the provisions of ss. 4 to 25 of the Limitation Act, then the day on which the deed was executed had to be excluded in computing the period prescribed under s. 20 of the Limitation Act. Even though there is some difference in the wordings of ss. 19 and 20 of the Limitation Act, but there can be no two opinions that the expiration of the period prescribed for a suit in s. 19 and the use of the words "prescribed period" in s. 20 have the same meaning.

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*Jainarayan Bapu v. Vithoba* (2) is a case similar to one in suit. In that case s. 12 was held to have applied for computing the period of limitation. If a suit could be filed till 20th of December, 1960 there is no reason why an acknowledgment or payment of interest made on 20th December, 1960 could not extend the period of limitation and a different interpretation should be put for prescribed period in the case of an acknowledgment or payment of interest than in a case of a suit.

Learned counsel for the respondent has contended that the period will not be extended in case the payment is made after the period of limitation. There can be no dispute about that proposition of law. The question is whether the payment was made within the period of limitation or not and if s. 12 is applied the payment was made within the period of limitation.

(1) A.I.R. 1955 All 41 (F. B.). (2) A.I.R. 1928 Nag. 142.

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The Courts below were, therefore wrong in holding that the payment was made beyond the period of limitation and fell in error in not applying s 12 of the Limitation Act.

The result, therefore, is that this appeal is allowed and the suit of the plaintiff shall stand decreed for Rs 1,700 with *pendente lite* and future interest at 3 per cent. Costs of this Court shall be on parties

*Appeal allowed*

## APPELLATE CIVIL

*Before Mr Justice Jagmohan Lal and Mr Justice D N. Jha\**

UMA SHANKER MISRA

APPELLANT,

*v.*

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ZILA SAHKARI FEDERATION

LTD AND OTHERS

... RESPONDENTS

**U. P. Co-operative Societies Act, 1965, s 131(3)(4) and U P Co-operative Societies Rules—Bye-laws—Amendment of to bring them in conformity with the provisions of the Act and Rules—Period of one year prescribed is merely directory—Amendment made after that period—Validity of**

The period of one year mentioned in sub-s (3) of s. 131 of the Act is directory and not mandatory. If a co-operative society fails to amend its bye-laws within one year as required by sub-s (3) the Registrar may make the necessary amendments. If before the Registrar actually takes any action under sub-s. (4) the Co-operative Society itself amends its bye-laws so as to bring them in conformity with the provisions of the Act and the Rules, even though it is done after the expiry of one year, the amendment would not be invalid for that reason.

*Sultan Singh v. A R Incharge* (1), relied on.

**U. P. General Clauses Act, 1904, ss 6 and 24, U. P. Co-operative Society Rules, rr. 416 and 418—Rule amended with**

\*While sitting at Lucknow

(1) 1971 A L J 943.

*effect from 5th December, 1969—Amended rules being inconsistent with the existing bye-laws—Effect of*

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*Held*, bye-laws cannot override the provisions of the rules or the Act as amended from time to time. The provisions contained in ss 6 and 24 of the General Clauses Act cannot be invoked to support the contention that the bye-laws containing provisions about the functioning of an election—Sub-Committee will continue to be valid even after 5th December, 1969

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Special Appeal no 39 of 1971 against the judgment and order dated 18th February, 1971 passed by K. B. SRIVASTAVA, J., in Writ Petition no 172 of 1970.

*K. N. Misra*, for the Appellant.

*Bheshwar Nath*, for the Respondent

JAGMOHAN LAI, J.—This special appeal has been filed against a judgment dated 18th February, 1971 passed by a learned single Judge of this Court dismissing the appellant's Writ Petition no 172 of 1970

The appellant Uma Shanker Misra is a member of the Zila Sahkari Federation (to be hereinafter referred to as the Federation), Rae Bareilly which is a registered Co-operative Society governed by the provisions of the U. P. Co-operative Societies Act, 1965 (to be hereinafter called as the Act). The Federation had a Committee of Management to carry on its day-to-day work. The election of the members of the Committee of Management is required to be made under s. 32(1)(b) of the Act in accordance with the provisions of the rules and of the bye-laws of the Federation. The Act further provided that the bye-laws of a co-operative society shall be in conformity with the provisions contained in the Act and the rules. R. 416 of the U. P. Co-operative Societies Rules (to be hereinafter called as the rules) as it stood prior to 5th December, 1969 provided:

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"416(a) For the purpose of election under these rules, every society referred to in r 414 shall have an election sub-committee consisting of—

(i) the Secretary of the society who shall act as convener of the sub-committee,

(ii) a member of the general body of the society nominated for the purpose by the committee of management; provided that he shall not be candidate himself for election in the ensuing annual general meeting;

(iii) a nominee of the District Magistrate to act as the Chairman of the sub-committee. Such nominee shall be as a Gazetted Officer not below the rank of a Deputy Collector;

(iv) a nominee of the Registrar.

(b) The election sub-committee shall discharge such duties and perform such functions as are enjoined upon it by these rules and the bye-laws of the society.

(c) The proceedings of the sub-committee shall be recorded and signed by the Secretary of the society and shall also be signed by the Chairman of the sub-committee. Other members of the sub-committee may also sign."

R 418 laid down the functions of the election sub-committee and provided:

(1) The election sub-committee shall, in the manner laid down in these rules or the bye-laws of the society, prepare a voters' list as it stood on the 15th day of the issue of the notice for the annual general meeting. The list shall be scrutinised, passed and signed by the election sub-committee.

(2) The election sub-committee shall—

(i) publish and display on the Notice Board of the Society a copy of the voters' list at least

twenty days before the date of the election  
One copy of the voters' list shall be filed in  
the office of the District Assistant Registrar  
concerned. Copies of the voters' list shall also  
be available for sale on such price as the elec-  
tion sub-committee may fix;

(11) fix the date for—

(a) filing of objections to the voters'  
list,

(b) disposal of objections to the voters'  
list,

(c) final publication of the voter's list,

(d) filing of nominations,

(e) display of the list of nominations,

(f) filing of objections to nominations,

(g) disposal of objections to nomina-  
tions,

(h) displaying and notifying the list of  
valid nominations,

(i) withdrawal of nominations, and

(j) finalization of list of nominations,  
after withdrawal, if any.

(3) List referred to in sub-cls (c), (e), (h) and (j)  
of cl (11) of sub-r. (2) above shall be placed on the  
Notice Board of the Society under the signature of  
the Secretary of the Society and certified copies of  
the same in duplicate shall, if so required by the  
election sub-committee be sent to the District  
Assistant Registrar concerned, where one such copy  
shall be available for inspection and other shall be  
placed on record

(4) Objection to voter's list and to nominations  
shall be sent to the Secretary of the Society and

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shall be disposed of by the election sub-committee. Proposals for nominations, which shall be in Form 'K' and withdrawal of nominations, shall also be addressed to the Secretary who shall put up the same before the election sub-committee for necessary action."

The Federation amended its bye-laws on 3rd September, 1969 so as to make them consistent with the provisions of the Act and the rules as required by s 131(3). In these bye-laws also provision was made for the procedure governing the election of members of the managing committee. It was provided in cl ( ३ ) of bye-law no 21 that the election of the members of the Committee of Management shall be made according to rules and the bye-laws. In cl (9) of bye-law no 22 it was provided that there shall be an election sub-committee for the purpose of conducting the election as provided in r 414 and the constitution of this sub-committee as laid down in the original r 416 was also reproduced in this cl (9) of the said bye-law. At another place in this bye-law the functions of the election sub-committee were laid down by reproducing the original r 418.

The election sub-committee met on 15th November, 1969 and drew up the election programme as required by the aforesaid r 418 read with bye-law no 22(11)( ३ ) (2). That programme was as follows:

"6th December, 1969—Date for the first publication of voters' list.

8th December, 1969—Date for filing objections to the voters' list.

10th December, 1969—Date for disposal of objections to the voters' list.

10th December, 1969—Date for final publication of voters' list.

15th December, 1969—Date for filing of nominations.

15th December, 1969—Date for display of list of nominations

17th December, 1969—Date for filing of objections to nominations

19th December, 1969—Date for disposal of the objections to the nominations

20th December, 1969—Date for displaying and notifying the list of valid nominations.

23rd December, 1969—Date for withdrawal of nominations.

23rd December, 1969—Date for finalisation of the list of nominations after withdrawals, if any

31st December, 1969—Date of the election of the members of the Board of Directors "

With effect from 5th December, 1969 rr 416 and 418 were amended. The amended r 416 provided for the appointment of a Scrutiny Officer by the District Magistrate for the purposes of conducting the election in place of the election sub-committee which ceased to have any legal existence after that date. Under the amended r 418 the various functions performed by the election sub-committee under the old rules were with slight modification assigned to the scrutiny officer.

It appears that no Scrutiny Officer was, however, nominated by the District Officer till 1st January, 1970 and up to that time the election sub-committee continued to function even though it ceased to have any legal existence with effect from 5th December, 1969. The election sub-committee after going through the various stages provided in the programme beginning with 6th December, notified the list of 8 valid nominations on 20th December, 1969. None of these 8

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validly nominated candidates withdrew his nomination by 23rd December, 1969, the date fixed for the purpose. The contention of the appellant was that since there were 13 elective members and only 8 valid candidates had stood for them, they automatically stood elected as members of the Committee of Management under r 421. But instead of the Presiding Officer making an announcement to this effect at the commencement of the election meeting, the Scrutiny Officer who had been nominated by the District Magistrate on 1st January, 1970 tried to go through this entire process *de novo* when the appellant feeling aggrieved by this act of the Scrutiny Officer and other officers charged with the conduct of the election filed a writ petition under Art 226 out of which this special appeal has arisen, praying for the quashing of these proceedings and issuing a *mandamus* or direction to the respondents 1 to 6 commanding them to convene the meeting of the general body of the Federation in which those 8 candidates whose nominations had been found to be valid by the election sub-committee and who were the appellant and respondents nos 7 to 13, be declared as duly elected members of the Committee of Management.

The writ petition was contested on behalf of the opposite-parties nos 1 to 6. Their defence was that since the election sub-committee had ceased to have any legal existence with effect from 5th December, 1969 the entire proceedings conducted by this body in connection with the election of the members of the Committee of Management from 6th December to 23rd December, 1969 were without jurisdiction and so the District Magistrate and the Scrutiny Officer were without their right to undergo these proceedings afresh. Their plea was accepted by the learned single Judge who dismissed the writ petition. Feeling aggrieved the petitioner filed this special appeal.



We heard the learned counsel for the parties. Sri K N Misra, learned counsel for the appellant, contended that though rr. 416 and 418 stood amended with effect from 5th December, 1969, the bye-laws of the Federation which also contained provisions in them analogous to those contained in old rr 416 and 418 stood intact and since the election had to be held in accordance with the rules and the bye-laws, the election sub-committee had jurisdiction to conduct the proceedings from 6th December to 23rd December, 1969 on the basis of these bye-laws. He argued that this action of the election sub-committee could not be deemed to be without jurisdiction particularly in view of the fact that no Scrutiny Officer was appointed by the District Magistrate till 1st January, 1970 and in the meantime the election sub-committee not only functioned as a *de facto* body but had also been clothed with legal authority when the District Magistrate after seeking a clarification from the Registrar, Co-operative Societies had stated that the Scrutiny Officer shall take up the thread from where it was left by the election sub-committee and the election sub-committee was abolished only under an order dated 26th December, 1969 (Ann 5).

The learned single Judge has held the bye-laws of the Federation as framed on 3rd September, 1969 invalid on the ground that they had not been made within one year from the date the Act came into force as required by sub-s. (3) of s. 131. This view of the learned Judge does not appear correct. In our opinion, the period of one year mentioned in sub-s (3) is directory and not mandatory. This period has been specified in this subsection merely for the purpose of ensuring an expeditious revision of the bye-laws necessary for the operation of the society in accordance with the provisions contained in the Act and the rules. A further provision has been made in sub-s. (4) that if a co-operative society

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fails to amend its bye-laws within one year as required by sub-s. (3) the Registrar may make the necessary amendments. If before the Registrar actually takes any action under sub-s. (4) the Co-operative Society itself amends its bye-laws so as to bring them in conformity with the provisions of the Act and the rules, even though it is done after the expiry of one year, the amendment would not be invalid for that reason. A similar view was held by a Bench of this Court with which we are in respectful agreement, in *Sultan Singh v. A R In-charge* (1). So, these bye-laws cannot be said to be invalid simply because they had been framed by the Federation on 3rd September, 1969 more than one year after the enforcement of the Act.

Another reason given by the learned single Judge for holding these bye-laws invalid is that there was nothing on record to prove that these bye-laws had been registered as required by sub-s (2) of s 12 of the Act. In our opinion, there was no occasion for the learned single Judge to record this finding when this matter was not put in issue by the opposite-parties by taking a plea that the bye-laws framed by this Federation on 3rd September, 1969 were invalid on account of their not being registered by the Registrar. It was alleged by the petitioner in para 2 of the writ petition that the Federation which was a society registered under the Co-operative Societies Act was governed by its existing bye-laws framed on 3rd September, 1969 under s 131 (3) of the Act. The reply of the opposite-parties to this averment as contained in para 4 of the counter-affidavit was that under sub-s (3) of s 131 of the federation was within a period of one year from the date of commencement of the Act required to delete or amend such bye-laws as were inconsistent with the provisions of the Act and the rules and make such

(1) (1971) A.L.J. 943

further bye-laws as may be necessary, having regard to the provisions of the Act and the rules framed therein. Beyond that nothing was said whether the bye-laws were actually so amended as required by s 131 (3) by the Federation itself or any action had been taken by the Registrar under sub-s (4) of that section in default of the Federation to do so. It was neither admitted nor denied if the Federation had actually framed its bye-laws on 3rd September, 1969 under s 131 (3) as alleged in para 2 of the writ petition nor it was contended that though these bye-laws had been so framed they were invalid for the reason that they had not been registered by the Registrar under s 12 (2). In the absence of any specific denial by the opposite-parties, the averment of the petitioner that its existing bye-laws had been framed under s 131 (3) on 3rd September, 1969, stands unrebutted and it will be presumed that these bye-laws were made regularly including their registration under s 12(2). So, on this ground also these bye-laws cannot be held to be invalid. There is, however, a more serious and fundamental objection to the validity of these bye-laws in so far as they became inconsistent with the provisions of rr 416 and 418 as amended on 5th December, 1969. As noted earlier, the provisions contained in these bye-laws regarding the constitution of the election sub-committee and its functions were simply a reproduction of the provisions of the original rr 416 and 418. This reproduction of the rules in the bye-laws was redundant though for that reason the bye-laws do not become invalid. But as soon as the rules were amended these provisions in the bye-laws will lose their validity in so far as they became inconsistent with the provisions of the amended rules. In that matter the bye-laws cannot override the provisions of the rules or the Act as amended from

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time to time It was held by the Supreme Court in *Harish Chandra v State of Madhya Pradesh* (1) that the position apart from s 24, General Clauses Act was that if the statute under which bye-laws are made is repealed, those bye-laws are impliedly repealed and cease to have any validity unless the repealing statute contains some provisions preserving the validity of the bye-laws notwithstanding the repeal

In this connection the learned counsel for the appellant referred to the provisions of ss 6 and 24 of the U P General Clauses Act In our opinion, none of these provisions can be invoked to support the appellants' contention that the bye-laws containing provisions about the functioning of an election sub-committee will continue to be valid even after 5th December, 1969 When the rr 416 and 418 were amended and the election sub-committee ceased to have any legal existence and was replaced by Scrutiny Officer S 24 provides that where any Act is repealed and is re-enacted by an U P Act with or without modification then unless it is otherwise expressly provided, any bye-law made under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted shall continue in force, and be deemed to have been made the provisions so re-enacted, unless and until it is superseded by any bye-law made under the provisions so re-enacted It may be conceded that this section applies not only to the repeal but also to the amendment of an Act as was held in *N S Dal Mill v Firm Sheo Prasad* (2) in which it was observed that in essence there is no distinction between such laws which repeal and re-enact an existing law and the laws which merely profess to amend, for the purpose of application of s 6 of U P General Clauses Act Further, it may also

(1) A.I.R., 1965 9,C. 992

(2) A.I.R. 1958 All. 404

be held that though both ss 6 and 24 of the U. P. General Clauses Act speak about an 'enactment' and not about rule the principle contained in these sections can be applied even to the repeal or amendment of a statutory rule. But the important condition is that the bye-law which is sought to be saved by s. 24 must not be inconsistent with the provisions of the amended rule. In the present case, as we have seen above, the provision regarding the election sub-committee was clearly inconsistent with the amended r 416. As such the bye-law to this extent cannot be saved by s 24.

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S 6 of the U P General Clauses Act speaks about any remedy or legal proceeding commenced before the repealing Act which may be enforced or continued and concluded as if the repealing Act had not been passed. But here also the overriding provision is that unless a different intention appears. In the present case, the election sub-committee which met on 15th November, 1969 had laid down a programme with respect to the election of the members of the Committee of Management of this Federation beginning from 6th December, and ending with 31st December, 1969. If the Scrutiny Officer who replaced this election sub-committee with effect from 5th December, 1969 had been appointed on the same date, he need not have laid down a fresh programme and he could very well follow the same programme without any legal objection. But after this date, the election sub-committee had no legal existence and the members of this committee could not continue to carry out this programme any longer. Their existence and functioning after 5th December, 1969 cannot be justified under s 6. It was held by a Full Bench of this Court in *Kanpur Municipality v Behari*

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*Lal* (1) that the repeal of the U. P. Pure Food Act had the necessary consequence of terminating the appointments of Public Analysts appointed under that Act unless then appointments are specifically saved. There was no such saving provision in the Prevention of Food Adulteration Act which repealed the U. P. Pure Food Act. As such the provisions of appointments of Public Analysts were not held to be valid for the purposes of the new Act by the application of s. 6 of the U. P. General Clauses Act.

The contention that the election sub-committee was abolished by the District Magistrate only under an order dated 26th December, 1969 (Ann. 5) and till then it was allowed to function, is also of no avail to the appellant. The election sub-committee ceased to have any legal existence by force of law with effect from 5th December, 1969 when rr. 416 to 418 were amended. It did not require any specific order from the District Magistrate to bring that result. That the committee was allowed to function even after 5th December, 1969 and no Scrutiny Officer was appointed till 1st January, 1970 will also not create any estoppel against the statute.

The learned counsel for the appellant then referred to the provision of sub-s. (9) which was added to s. 131 of the Act by the U. P. Co-operative Societies (Removal of Difficulties) Order, 1969 promulgated on 6th August, 1969 by the State Government under the provisions of s. 133 of the Act and was to remain in force up to 25th January, 1970. This sub-section provided:

“Where the term of the Committee of Management of a Co-operative Society expires at any time during the period of operation of the Uttar Pradesh Co-operative Societies (Removal of Difficulties) Order, 1969 and the bye-laws of such society

(1) A.I.R. 1980 All. 546 (F.B.).

have not been amended under sub-s (2) or sub-s. (3), the term of the Committee of Management of the society may be extended or, as the case may be, the committee may be reconstituted in accordance with the provisions of the bye-laws of the society, as in force immediately preceding the date of commencement of the Act, and, notwithstanding anything in this Act, no act or proceeding of the Committee of Management which is so reconstituted or the term whereof is so extended shall be invalid or questioned in court merely on the ground that the bye-law under which its term has been so extended or it has been so reconstituted had become inoperative by virtue of the provisions of sub-s. (1) of s 131 or that up to the time of the reconstitution of the Committee of Management in accordance with the provisions of this section, the extension of the term of the Committee of Management or its reconstitution was inconsistent with the provisions of this Act, or the rules "

In our opinion, this provision has no application to the present case. In this case the bye-laws of the society had been amended under s 131 (3). The election of the member of the Committee of Management was to be made in accordance with the provisions of the Act, the rules and the bye-laws so amended. The programme for the election had actually been laid down when the ss. 116 to 118 were amended so as to replace the election sub-committee by the Scrutiny Officer. It is true that the District Magistrate by inadvertence did not appoint a Scrutiny Officer immediately on 5th December, 1969 and thus created a gap. But there is nothing on record to show that during this period the term of the old Committee of Management of this Federation was expiring. Even if this term was

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expiring, that very committee could continue till the completion of the election of the new committee according to law by virtue of the provisions contained in this sub-s (9). Of course, this lapse on the part of the District Magistrate caused some delay in the completion of the election programme but it did not create any unsurmountable difficulty. In any case, the terms of this sub-s (9) did not warrant the application of those bye-laws of the Federation which had become inconsistent with the provisions of the amended rr. 416 to 418 after 5th December, 1969. The election proceedings had to wait till the Scrutiny Officer was appointed on 1st January, 1970 and thereafter he could lay down a fresh programme and complete the election according to the provisions of the Act, amended rules and the bye-laws to the extent they were not inconsistent with the rules. That was actually what was being done when the appellant rushed to this Court by filing a writ petition and stopped the Scrutiny Officer from proceeding further by obtaining a stay order from this Court. Since the writ petition has been dismissed, the Scrutiny Officer would now complete that election programme. The appeal has therefore no force and it is dismissed with costs to the contesting respondents.

*Appeal dismissed*



## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr Justice  
A. Banerji*

MURLIDHAR AGARWAL

APPELLANT

v.

DEPUTY DIRECTOR, CONSOLI-

DATION, U P AND OTHERS

.. RESPONDENTS

1978

August, 31

**U. P. Consolidation of Holdings Act, 1953, s 48—Second appeal filed in 1967 after the coming into force of the Amending Act No 8 of 1963—Deputy Director can convert it into a revision and decide it as such**

When the second appeal had been transferred to the Deputy Director, he had full seisin of the case, if on finding that the memorandum was wrongly described as a second appeal and was entertainable validly in law as a revision, he had the requisite jurisdiction and power to effect the conversion of the second appeal into a revision

In such circumstances, it is in the interest of justice fit and proper to convert the appeal into a revision and to hear it and decide it as such

Special Appeal No 466 of 1971 from the judgment and decree of B N LOKUR, J, dated 17th May, 1971

*Sripat Narain Singh*, for the Appellant

*N S Joshi*, S C., for the Respondents

S CHANDRA, J.—Aggrieved against an order of the Consolidation Officer the appellant filed an appeal before the Settlement Officer. The same was dismissed on 16th December, 1967. Feeling aggrieved the appellant filed a second appeal before the District Deputy Director of Consolidation. On 20th June, 1968 the Deputy Director of Consolidation dismissed the revision on the ground that it was not properly presented by the counsel and that no second appeal lay. The Deputy Director also declined to convert the second appeal into a revision and to treat it as a revision. Aggrieved the appellant filed a writ petition. A learned

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single Judge upheld the appellant's plea that there was no defect in presentation. Shri Mathur the counsel had authority by virtue of the *vakalatnama* filed by him before the Settlement Officer (Consolidation) to file a second appeal. It is also held that the appellant himself had also signed the memorandum of appeal and that was enough to sustain the validity of its presentation. He held that the presentation of the appeal was valid and proper. In respect of the second aspect the learned single Judge held that a second appeal was presentable to the District Deputy Director of Consolidation. In the present case the second appeal was presented to the District Deputy Director. The appellant has not shown that the District Deputy Director who received the second appeal of the appellant was also authorised to entertain the revision application under s 48. That being so, a second appeal presented to the District Deputy Director of Consolidation could not be treated as a revision application presented to the Director of Consolidation or a duly authorised Deputy Director. It is also held that the Deputy Director to whom the second appeal was transferred had the limited jurisdiction to dispose of the second appeal as a second appeal and acting within that limited jurisdiction he had no power to treat the second appeal as a revision under s 48. On these findings the writ petition was dismissed.

We have no hesitation in agreeing with the view of the learned single Judge that in the circumstances of the case there was no factual or legal defect in the presentation of the second appeal by Shri Mathur.

We are, however, unable to sustain the view in regard to the powers of the Deputy Director to convert the second appeal into a revision. Under the proviso

to s 47 of the Amending Act 8 of 1963 no second appeals lay or could be instituted after the coming into force of the amending Act on 8th March, 1963. After 8th March, 1963 decisions of the Settlement Officer could be assailed only by way of a revision to the Director of Consolidation under s 48. In the present case the appellant has challenged the order of the Settlement Officer. The memorandum of second appeal was duly entertained by the District Deputy Director. In the ordinary course of business the memorandum was transferred to the Deputy Director of Consolidation for disposal. Since after 8th March, 1963 no second appeals were entertainable coupled with the fact that in the present case the second appeal was filed somewhere in 1967 long after the vanishing of the second appellate jurisdiction it can be presumed that the Deputy Director of Consolidation to whom the present second appeal was transferred for disposal could not have possessed any authority to entertain or dispose of second appeals. Under the Act the Deputy Director was authorised to exercise his power conferred on him by s 48. In our opinion, the Deputy Director had the requisite authority to decide the case as a revision only. When the second appeal was transferred to him he had full seisin of the case, if on finding that the memorandum was wrongly described as a second appeal and was entertainable validly in law only as a revision. We have no doubt that he had the requisite jurisdiction and power to effect the conversion of the second appeal into a revision. It has not been found that if the memorandum of appeal is treated as a revision it would have been barred by time.

It is well settled that the description given to a memorandum of appeal is not final and binding on the

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1973 court. If a litigant being under an impression that a  
~~MURDER DEAR~~ second appeal lies, files as second appeal, the Court is  
~~AGARWAL~~ not bound to treat it a second appeal. If it finds that  
~~U~~ in law no second appeal lies but in its place a revision,  
~~DEPUTY~~ in such circumstances it is in the interests of justice  
~~DIRECTOR~~ fit and proper to convert the appeal into a revision and  
~~CONSOLIDATION, U P.~~ to hear and decide it as such. These are merely ministerial matters. In the absence of a statutory prohibition, the authority possessing the power of deciding a revision, has, by implication, the power to effect the conversion of memorandum of appeal into a revision, and then to hear and decide it as such. In our opinion, the Deputy Director was in error in holding that he had no jurisdiction to convert the second appeal into a revision. He ought to have permitted it and then to have decided the matter on merits.

In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside. The writ petition is allowed. The order of the Deputy Director is quashed. The matter is sent back to the Deputy Director concerned for disposal of the revision in accordance with law. The parties will, however, bear their own costs.

*Appeal allowed*

#### CIVIL REFERENCE

*Before Mr Justice Jagmohan Lal and Mr. Justice  
 S K Kaul\**

RAJA VIJAY KUMAR

APPELLANT

*v*

STATE

OPPOSITE-PARTY

1978 September, 8 U. P. Agriculture Income Tax Act, 1948, ss. 5 and 6 (2)(b)—  
 1978 Agricultural Income-tax—Computation of—Loss incurred

\* While sitting at Lucknow

*under s 6(2) (b), should be set off against his income under s 5*

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Civil Reference No 9 of 1957 made by Agricultural Income-tax Revision Board, U P, Allahabad dated 2nd July, 1957 in Misc Case No 3 of 1957

*J C Srivastava*, for the Applicant

*K S Verma*, for the Opposite-party.

**J M LAL, J** —In compliance with an order dated 11th February, 1957 passed by this Court under sub-s (4) of s 24 of the U P Agricultural Income Tax Act, 1948 (to be hereinafter called as the Act) the following reference has been made by the Revision Board under sub-s (1) of the said section. The question of law for the purpose of the present reference was whether in computing the total agricultural income-tax of the assessee the loss, which he had incurred under s. 6(2) (b) should be set off against his income under s. 5

S (1) of the Act which is the charging section provides that agricultural income-tax and super tax at the rate or rates specified in the schedule shall be charged for each year in accordance with, and subject to the provisions of this Act and rules framed under cls (a), (b) and (c) of sub-s (2) of s 44, on the total agricultural income of the previous year of every person. The expression "total agricultural income" has been defined in sub-s (16) of s 2 as meaning the aggregate of the amounts of agricultural income of the different classes specified in ss 5 and 6 determined respectively in the manner laid down in the said sections and includes all receipts of the description specified in cls (a), (b) and (c) of sub-s (1) of s 2. In sub-s. (1) of s 2 "agricultural income has been defined as—

(a) any rent or revenue derived from land which is used for agricultural purposes and is either

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assessed to land revenue in the Uttar Pradesh or is subject to a local rate or cess assessed and collected by an officer of the State Government,

(b) any income derived from such land by—

(1) agriculture, or

(ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii),

(c) any income derived from any building owned and occupied by the receiver of the rent revenue of any such land, or occupied by the cultivator or the receiver of rent in kind of any land with respect to which, or the produce of which, any operation mentioned in paras (ii) and (iii) of sub-cl (b) is carried on.

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or receiver of the rent in kind by reason of his connection with the land, requires as a dwelling house, or as a store house, or other out-building "

On the items that go to constitute agricultural income is the income derived by an assessee from land by agriculture or performance of any process ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market or by the sale of the

produce raised by him in respect of which no process has been performed. The method of computing this item of agricultural income has been laid down in s 6 which provides that the agricultural income mentioned in sub-cl (i), (ii) and (iii) of cl (b) of sub-cl (1) of s. 2 shall at the option of the assessee be computed in accordance with cl (a) or cl (b) of sub-s. (2). Cl (a) gives an option to the assessee to accept the income derived by him from agriculture on the basis of the rent of the land as multiplied by such multiple as the Land Reforms Commissioner may fix and after making such deductions in respect of the agricultural calamities as may be prescribed. The advantage of this method of calculation is that the assessee need not keep elaborate accounts and his income can be assumed for the purposes of taxation in this rough and ready manner even though the actual income may be more or less than this amount.

The other option given to assessee is to maintain accounts about the net value of the produce raised by him on the land after making certain deduction as provided in sub-cl (i) to (v) of cl (b). It is possible that due to some agricultural calamity the actual value of the produce may be less than the sum total of those expenses which have to be deducted under sub-cl (i) to (v). The net result in such a case would be a minus figure.

The question that now arises is whether in calculating the total agricultural income by s 2(1) is required to be calculated by adding up the items mentioned in cl (a), (b) and (c) of that sub-s, if the figure under item (b) which relates to the net income derived from agricultural carried by the assessee on the land is a minus figure, meaning thereby that the cultivation

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has actually resulted in a loss to the assessee, that minus figure has to be deducted from the plus figures found under items (a) and (c). We think there is no reason not to deduct this figure in working out the total income. There is really no question of set off but it is only an arithmetical manner of addition of a few items one of which is minus and the others are plus. It is the sum total of these items that gives the total agricultural income. If that total itself is a minus figure, obviously no tax can be levied. At the same time, loss cannot be carried over to a subsequent year because there is no provision in the Act for the carrying over of the loss to another year. Our attention has been drawn to the word "respectively" used in sub-s (16) of s 2 which contains the definition of "total agricultural income". In our opinion this word "respectively" only shows that the different items of income mentioned in cls (a), (b) and (c) of sub-s (1) of s 2 have to be determined separately in the manner laid down in sections 5 and 6. After that determination has been made, all these figures relating to the items (a), (b) and (c) including a minus have to be added together. It does not certainly mean that if the figure arrived at after calculating in the manner laid down in s 6(1) (b) the net income from actual cultivation of land by the assessee, is a minus figure, that has to be ignored and only the plus figures relating to receipts of rentals from tenants and from the occupiers of the agricultural buildings calculated in the manner laid down in s 5 and s 2(1) (c) read with s 7 have to be taken into consideration for arriving at the total agricultural income of the assessee. That would obviously be quite unjust and is not warranted by the language of s 2(16) or s 6(1) (b). We accordingly answer this reference in the affirmative. In the circumstances of the case the parties shall bear their own costs.

*Answered in affirmative.*



## APPELLATE CIVIL

*Before Mr Justice S Chandra and Mr Justice  
A. Banerji*

KANTI SARAN

.. APPELLANT,

v.

L. BABU RAM AND OTHERS

.. RESPONDENTS.

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*Constitution of India, Art 226 and Civil Procedure Code, 1908, s 115—Revision dismissed by the High Court—Order impugned in the revision merges in the order of the High Court in revision—Writ petition against the order impugned in the revision incompetent.*

Where a revision is dismissed on the finding that no question of jurisdiction arose so as to attract the provisions of s 115, C P C, the dismissal of revision would be treated as on merits. The finding that the case was not brought within any of the clauses of s 115, C P C is a finding on merits. The principle of merger would apply to a decision given in the revisional jurisdiction and the same order which has been challenged in the revision cannot be challenged in a writ petition and the writ petition would not be competent.

*Shankar v Krishna (1) relied*

Special Appeal No 515 of 1966 against the judgment and order of S C MANCIANDA, J. dated 12th July, 1966 in Civil Misc. Writ Petition No 2290 of 1960

*B Dayal and Vishnu Sahai, for the Appellant*

*D Sanyal, S C, for the Respondents*

S CHANDRA, J.—The appellant filed an objection under s. 14 of the Arbitration Act against an arbitration award. The trial court rejected the objection. On appeal the same was followed and the award was set aside. The respondents filed a revision in this Court. The order of the lower appellate court was challenged on the ground that its finding on the question of misconduct by the arbitrator was without jurisdiction. A learned single Judge dismissed the revision on 18th May, 1960, on the finding that

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no question of jurisdiction arose so as to attract the provisions of s. 115, C P C. On this view the revision was dismissed with costs. Hereafter the respondent Babu Ram filed a writ petition in this Court to challenge the validity of the same order of the lower appellate court. A learned single Judge went into the merits of the case and found that there was manifest error of law and so quashed the appellate order of the Civil Judge

It has been argued on behalf of the appellant that the writ petition was maintainable and the learned single Judge had no jurisdiction to consider the merits of the order passed by the lower appellate court. It was urged that by the dismissal of the revision after hearing both parties the order of the Civil Judge merged in the order of the High Court. The High Court was thereafter incompetent to reconsider an order which had already merged in that of the High Court. In support reliance has been placed upon *Shanker v. Krishna* (1) where it was held that where a revision is decided after hearing both the parties, the order of the lower appellate court becomes merged in the order made in revision and thereafter the appellate order cannot be challenged or attacked by another set of proceedings in the High Court under Art 226 or 227 of the Constitution. It was also held that even if the principle of merger did not apply, the writ petition ought not to be entertained by the High Court when the petitioner had already chosen the remedy under s. 115, C P C. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court. This decision

is fully applicable to the present case. Here the respondent had chosen to challenge the order of the learned Civil Judge by a revision. The revision was heard and dismissed at the final hearing. The revision was dismissed with costs after hearing both the parties. By this decision the order of the learned Civil Judge merged in the order of the High Court and thereafter it was not competent for the respondent to challenge it by way of a writ petition.

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For the respondent it was urged that the revision not having been decided on the merits, no merger took place. We are unable to agree. The ground upon which the order was challenged was that the finding with regard to the misconduct of the arbitrator was without jurisdiction. The learned single Judge also thought that no question of jurisdiction arose obviously on the view that the findings on questions of fact or law did not attract any of the three clauses of s 115, C P C. This was a decision on the merits of the revision. It cannot be said that the Court did not decide the revision on its merits. The revisional jurisdiction is circumscribed by cls (a), (b) and (c) of s. 115, C. P. C., and before relief can be granted, one of those clauses must be satisfied. The finding that the case was not brought within any of those clauses is a finding on the merits of the revision. In the case of *Shanker* (1) aforesaid it was held that the revisional jurisdiction, though circumscribed by s 115, is nonetheless basically and fundamentally the appellate jurisdiction of the High Court and the principle of merger would apply to a decision given in the revisional jurisdiction. In our opinion, the writ petition was not competent.

It was then urged that the appeal should have raised this objection before the learned single Judge. That

(1) A.I.R. 1970 S.C. 1.

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is true. But when it is found that the writ petition is not competent, the question becomes one of jurisdiction and it is well settled that a question of jurisdiction can be taken at any time. The mere non-raising of such an objection by the parties could not confer jurisdiction upon the Court where none existed. The question is one of existence of jurisdiction and not of its exercise. The fact that the appellant did not specifically raise this objection at the hearing before the learned single Judge will not render the judgment allowing the writ petition one made with jurisdiction.

In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed with costs.

*Appeal allowed*

## APPELLATE CIVIL

*Before Mr Justice K B Asthana and Mr.  
Justice K C. Agarwal*

RAJA RAM JAISWAL MANAG-  
ING DIRECTOR OF MESSRS  
ALLAHABAD THEATRES  
AND OTHERS

... APPELLANTS,

*v.*

KUSUM KUMARI

... RESPONDENT.

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U. P. Urban Buildings (Regulations of Letting Rent and Eviction) Act, 1972, s. 43(2) (s) and U. P. (Temporary) Control of Rent and Eviction Act, 1947, s. 3(1).

*Suit for eviction and realisation of rent under the 1947 Act—Dismissed by Courts below—Second appeal pending—Commencement of 1972 Act—Appeal to be decided according to 1947 Act.*

Saving clause contained in s. 43 (2) (s) is meant only for limited purpose, the purpose being that in case a suit on one

of the grounds mentioned in s 3(1) of the old Act is pending either in original court or in appeal, the same would be permitted to continue as if new Act has not been enforced

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Apart from this, there are savings, which have been provided for in s 43 (2) of the new Act. Those savings contained in other provisions of the aforesaid section, appear to have been made applicable only to those buildings or premises which are governed by the provisions of the new Act, and not otherwise.

U P. General Clauses Act, 1904, s. 6—*U P Temporary Control of Rent and Eviction Act came to an end—New Act came into force—Whether s 6 of the Act applicable.*

In the case of a temporary Statute the provisions of s 6 of the General Clauses Act are not applicable as this section does not deal with the repeal of temporary Statutes, and deals only with permanent Statutes.

S 6 of U P. General Clauses Act cannot have the effect of extending the life of a temporary Act beyond the period stated in the temporary Act itself. As a result s 6 of the U P. General Clauses Act would be effective only to the original date of its expiry. Hence the only result will be that up to the original date of its expiry rights and liabilities accrued and incurred under the temporary Act before the repeal would be continued to be enforced and proceedings in regard to them would be permitted to be taken in spite of the repeal. It is only to this limited extent that s 6 of the U P General Clauses Act would be applicable.

First Appeal No. 372 of 1968 connected with F. A. No. 102 of 1970 against the decree of B P SHUKLA, Civil Judge, Allahabad, dated 1st May, 1968 in Suit No 38 of 1968

*Bashir Ahmad*, for the Appellant

*Gyan Prakash*, for the Respondent.

K C AGARWAL, J.—Suit No 38 of 1966, giving rise to the above appeal was filed by the appellant Messrs Allahabad Theatres Private Ltd, against the respondent Smt Kusum Kumari for eviction from the property known as Jawahar Palace, No 29 (old)/98 (new) Jawahar Square, Allahabad, now run under the name of Naaz Cinema, along with all its fitting, electric and otherwise, furniture, operating instruments,

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fixtures and other appurtenant articles and accessories, including the building, seats, machinery and fans, etc. A decree for arrears of rent, damages, insurance money and Bhumi Bhawan Kar, amounting to Rs 13,496 91 was also claimed

The said suit was filed on the allegations that the appellant was a private limited company and had been floated with the object of carrying in the cinema business by acquiring lands and buildings for that purpose. The said company constructed the premises no 29 (old)/98 (new) in Jawahar Square, Allahabad. The entire building was fitted with projectors, screen, electric fittings, balcony, furniture, etc. The said accommodation was constructed for the purpose of cinema business and no other. The entire premises became ready in 1934 and the said Company carried on the business of exhibiting films for some time, and thereafter they had been running the same business through others. It was further alleged in this connection that the entire cinema business along with the building, cinema accessories, and articles appertaining thereto, including fittings, electric and otherwise, seats, machinery, furniture etc., was leased out for two years by the appellant to the respondent on a fixed and unalterable rent of Rs 1,000 per month. The period of two years was to expire on 30th November, 1962. The respondent had been carrying on the business under the name and style of Naaz Cinema and paying rent at the rate of Rs 1,000 per month on the basis of the aforesaid lease deed. The respondent did not vacate the premises on the expiry of the said period of two years and continued to run the business. The appellant subsequently by a notice dated the 4th September, 1964 called upon the respondent to pay all arrears due from 1st January, 1963 to 31st August, 1964. The said notice had also

purported to terminate the tenancy of the respondent. The appellant, thereafter, sent another notice, which was served on the respondent on 22nd September 1955, but the respondent neither remitted the entire rent which due to the appellant nor did she vacate the premises and hand over the same to the appellant. Accordingly the appellant filed the aforesaid suit for the reliefs mentioned above. It may be mentioned here that the appellant in the aforesaid suit also set up a plea that since the cinema house along with the running business had been let out to the respondent, therefore the provisions of the U P (Temporary) Control of Rent and Eviction Act did not apply to the premises in question, hence the appellant was entitled to the decree for eviction without proving compliance with the provisions of the aforesaid Act. In the alternative it was, however, also pleaded by the appellant that even if it was found that the aforesaid Act applied to the premises in question, the respondent had committed default in making payment of rent in spite of the service of notice of demand under s 3(1) (a) of the said Act, and therefore she was liable to be evicted on that ground.

The suit was contested by the respondent, and the liability to eviction was denied. It was alleged by her that what was let out to her was the cinema building, which was 'accommodation' within the meaning of that word defined in the U P (Temporary) Control of Rent and Eviction Act, and, as such, she could not be dispossessed without complying with the provisions of the said Act. In reply to the allegation relating to default committed by her in making payment of rent, it was asserted that she had paid the entire rent and that she could not thus be found to be a defaulter, and therefore a decree for possession on the basis of s 3(1)(a)

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could not be granted to the appellant. The respondent also pleaded that she had obtained an order of allotment in her favour allotting the premises in question under the provisions of the U P (Temporary) Control of Rent and Eviction Act. Accordingly, it was alleged that so long as the allotment order subsisted she could not be dispossessed.

On the aforesaid pleadings of the parties a number of issues arose for decision in the court below. One of the main issues was relating to the applicability of the provisions of the U P (Temporary) Control of Rent and Eviction Act to the premises or property from which eviction was being sought by the respondent. The court below took the view that what was let out to the respondent by the appellant was not the running cinema business but the cinema building, which was accommodation within the meaning of the aforesaid Act, hence the provisions of the same applied. The court below, further, found that as the respondent had not committed any default in making payment of rent as required by s 3 of the Act she was not liable to eviction on that basis. The allotment orders set up by the respondent was found to be valid. On these findings the court below dismissed the suit of the appellant for eviction and arrears of rent. A decree for the amount of Rs 400.75 as insurance charges, and Rs 900.60 as Bhumi Bhavan Kar was, however, granted in its favour against the respondent. Aggrieved against the decision of the court below the present appeal has been filed.

*Sri Bashir Ahmed*, learned counsel appearing for the appellant, argued that the provisions of the U P (Temporary) Control of Rent and Eviction Act did not apply to a cinema building and, therefore, the court



below erred in dismissing the suit of the plaintiff by applying the provisions of the said Act to it. In the alternative, it was argued that if in the case of a cinema it was essential to establish that what was let out was not the building but the running cinema business, even then from the evidence in the present case it was established that the appellant had not only let out the cinema building but the running cinema business as well, and accordingly the court below should not have applied the provisions of the U. P. (Temporary) Control of Rent and Eviction Act to the present premises and should have granted the decree of dispossession to the appellant. The other findings of the court below were also challenged by *Shi Bashu Ahmed*

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The learned Advocate General, appearing for the respondent, submitted in reply that all buildings, residential or non-residential, are covered by the definition of the word 'accommodation' in the U. P. (Temporary) Control of Rent and Eviction Act and as the cinema house which was let out in the present case was accommodation within the meaning of the aforesaid Act the appellant could not get the decree for eviction without complying with the requirements of s 3 of that Act. The learned Advocate General further relied on *Dwarika Das Saraf v Dwarka Prasad* (1) and urged on its basis that in order to oust the provisions of the U. P. (Temporary) Control of Rent and Eviction Act in relation to a cinema house it was necessary to establish by the appellant that the running business in the cinema house was also leased out or given to the respondent at the time of the execution of the lease, and since in the present case the appellant had not leased any running business to the respondent the court below was right in deciding the said issue in

(1) 1973 A.L.J. 602.

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favour of the respondent. He further urged that none of the grounds enabling the appellant to file a suit for eviction, as required by s 3 of the aforesaid Act, had been made out.

During the course of the arguments Sri *Bashir Ahmad* pointed out to us that cinema building has been completely exempted from the operation of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the new Act), hence after the repeal of the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter referred to as the old Act) by the new Act, the appellant became entitled to a decree for dispossession against the respondent, and High Court being the appellate court should, after considering the evidence already on the record, pass a decree in his favour. The learned Advocate General appearing for the respondent, conceded that he was not in a position to dispute the proposition that an appellate Court could take into account the change of law and decide an appeal in accordance with the same. However, he submitted that in view of the saving clause contained in s 43(2) (s) of the new Act all the rights of the parties in the present appeal have to be decided on the assumption as if that Act had not come into force at all. The other argument made in the alternative in this connection was that s 6 of the U. P. General Clauses Act also applied, and, therefore, the rights and privileges which had been acquired by him under the old Act would not be taken away by applying the provisions of the new Act. It was, however, admitted by him that in case this Court were to take the view that the new Act applied to the present case and the rights of the parties could be decided on that basis it was needless to go into the question of the rights of the parties under the old Act.

The general principle of law is that a suit must be tried on the original cause of action. This principle does not wholly govern suit but also appeals. There are however, certain exceptions to this general rule, as sometimes the original relief claimed becomes inappropriate or the law changes, affecting the rights of the parties. In such cases courts may allow amendment of pleadings and permit the parties to fight out their rights on the basis of these changes. Thus if we ultimately find that we are unable to uphold the contention of the learned Advocate General it may be proper for us to permit the amendment of the plaint and to direct the parties to get their rights adjudicated upon in accordance with the changed law. We therefore, would like to decide the question of the applicability of the new Act first before taking up the question as to whether the suit was in respect of premises to which the provisions of the old Act applied or not.

The learned Advocate General relied upon s. 43(2)(s) of the new Act and argued that as the present case was also filed by the appellant on one of the grounds mentioned in sub-s. (1) of s. 3 of the old Act the appeal has to be continued and concluded as if the new Act had not been passed. He emphasised that in the plaint the appellant himself had asserted that the respondent had committed default in not making payment of rent within the period of one month of the service of notice of demand and as this was a ground covered by sub-s. (1) of s. 3 of the old Act the suit has got to be considered as one filed under the provisions of that Act. Sri *Bashir Ahmad*, for the appellant, urged that the suit, which was filed by him, was one to which the provisions of the old Act did not apply, and it was only in the alternative that the appellant had taken up the plea that in case the court found that the provisions of the old Act applied, in that event as the respondent had

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committed default and had not made payment of rent within the period of one month from the date of service of the notice of demand, the ground under s 3(1) (a) of the old Act should be deemed to have been made out and on that basis the appellant should be given the decree for dispossession. He urged further that the plaint in the instant case was a composite plaint and, therefore, it could not be said that the suit for eviction of the respondent was instituted on any ground mentioned in sub-s (1) of s 3 of the old Act.

The provisions of the Urban Buildings (Regulation of Letting, Rent and Eviction) Act which has now been enforced are materially different on many aspects from that of the old Act. In the new Act the rights given and remedies provided are much different than those which were the subject-matter of the old Act. In the old Act the word 'accommodation' was defined and only those constructions which fell within the four corners of that definition could be the subject-matter of the provisions of that Act. In the old Act the word 'accommodation' was defined as follows.

"S 2 (a) *Accommodation*—'accommodation' means residential and non-residential accommodation in any building or part of a building and includes—

(i) gardens, grounds and outhouses, if any, appurtenant to such building or part of a building;

(ii) any furniture supplied by the landlord for use in such building or part of a building,

(iii) any fitting affixed to such building or part of a building for the more beneficial enjoyment thereof,

but does not include any accommodation used as a factory or for an industrial purpose

where the business carried on in or upon the building is also leased out to the lessee by the same transaction "

We, however, find that in the new Act the scheme is quite different from that in the previous Act. S. 2 of the new Act provides for exemptions from the operation of this Act. So far as a cinema house is concerned the sub-s (1), cl. (d) of this section says:

"Nothing in this Act shall apply to . . . . .  
any building used or intended to be used for any other industrial purpose (that is to say, for the purposes of manufacture, preservation or processing of any goods) or as a cinema or theatre, where the plant and apparatus installed for such purpose in the building is leased out along with the building."

Thus it appears that now under the new Act in respect of any building which is being used as a cinema house where plant and apparatus is installed and the same has been leased out along with the building, the intention is to exempt the same from the operation of the Act. Under the old Act, according to the view of this Court in *D D Saraf v. Dwarka Prasad* (1), it was only when a cinema house along with the running business were let out that the same could be considered as premises to which the provisions of the old Act did not apply. Under the old Act a building actually used for industrial purposes was excluded from the definition of the word 'accommodation', provided the business carried on was also leased to the lessee by the same transaction, whereas under the new Act a building is exempt from the operation of that Act not only when it is used for industrial purposes but also when it is intended to be used for such purposes. There is thus a material difference so far as the application of

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the two Acts is concerned, with regard to the cinema business. Apart from this, the new Act, as stated above, provides for different contingencies, different forums, different remedies, different liabilities, different consequences, different subject-matter than those provided in the old Act. Some of the old rights have been destroyed and new have been created. It is in this light that we have to consider the effect of the saving clause contained in s 43(2)(s) of the new Act. It is not only with regard to a cinema that the difference pointed out by us above is to be found. There are some other exemptions contained in s 2 of the new Act which were previously the subject matter of the old Act. The result of this exemption would be that in all those cases where the provisions of the old Act do not apply the landlord would not be required to fulfil the requirements of the provisions of that Act as he can bring a suit for dispossession on the strength of right in the civil court directly. It does not, therefore, appear reasonable to hold that although a cinema house which may otherwise be one to which the provisions of the new Act do not apply may still be, for the purposes of applying s 43(2)(s), be considered as a building in respect of which the suit may be continued under the old Act, although the rights of the parties *qua* the same are not to be decided on the basis of the provisions of that Act. It will further be seen that while the application of the provisions of s. 43(2)(s) to cases where suits in the original court, or in appeal are pending on the date of the enforcement of the new Act, may result in asking the plaintiffs to continue those proceedings in accordance with the old Act, a landlord who may not have instituted a suit before the enforcement of the new Act may do so now without fulfilling either the requirements of the old Act or the new Act, as contained in s 3 and s 20 of the respective

Acts. It, therefore, appears to us that the saving clause contained in s. 13(2) (s) is meant only for a limited purpose, the purpose being that in case a suit on one of the grounds mentioned in s. 3(1) of the old Act is pending either at the original court or in appeal, the same would be permitted to continue as if the new Act has not been enforced. The purpose or intention of providing such a saving clause with regard to these suits is not far to seek. The provisions of the new Act contained in s. 20 provide various grounds for eviction of a tenant. A comparison of cls. (a) to (g) of s. 14(1) of the old Act with cls. (a) to (g) of s. 20(2) of the new Act would show some distinguishing features. In all material particulars they would be found to be the same. Hence as no useful purpose was going to be served by making the suits already filed on one of the grounds mentioned in s. 3(2) of the old Act as null and void the Legislature by s. 43(2) (s) provided that these suits would continue as if the new Act had not come into force. It may be said that the suits filed before the enforcement of the present Act would have been tried otherwise also under the old Act even without the saving clause. Hence what was the utility of providing for it? It appears that the Legislature did not want to leave any scope for arguments and on that end in view made this saving provision. Apart from this there are various other savings which have been provided for in s. 13(2) of the new Act. These savings, contained in other provisions of the foresaid section, appear to us to have been made applicable only to those buildings or premises which are governed by the provisions of the new Act, and not otherwise. As observed in Halsbury's Laws of England, Third Edition, Vol. 36 at p. 401:

"The saving clause preserves something which would be otherwise included in the words of the enacting part."

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As noted above, there could be no purpose to provide for the saving of those suits which were filed in respect of buildings now exempted from the operation of the new Act, and to issue a mandate that they would be decided on the basis of the provisions of the old Act. It may further be noted in this connection that the new Act does not preserve any right in respect of buildings exempted now. It would not, therefore, be logical to hold that the saving clause of the new Act applied even to those buildings to which the provisions of the new Act may not be applicable. We, therefore, do not accept the contention of the learned Advocate General that sub-s. 2(s) of s 43 in any way compels that the proceedings of the suit having been commenced on one of the grounds mentioned in s 3(1) of the old Act must be continued and decided on that basis. It may, however, be pointed out that we are also impressed by the argument of Sri *Bashir Ahmed* that the present was not a case solely on the ground mentioned in s 3(1)(a) of the old Act. It was a suit where the plaint was composite both on the ground mentioned in s. 3(1) (a) and independent of it. We cannot, therefore, hold that the present was a suit solely based on the aforesaid ground, more so when we find that by means of an amendment application made in this Court the appellant had withdrawn the plea relating to s 3(1)(a) of the old Act which was initially taken in the suit. The effect of the withdrawal would be as if the suit on this ground was never filed.

The other argument made by the learned Advocate General in this connection was that even if s. 43(2) (i) did not apply he was entitled to the adjudication of the rights of his client on the basis of the law as it stood before the new Act. In this connection he invited our attention to s. 6 of the U. P. General Clauses Act and pointed out that his case would not



only be covered by one clause of this section but various clauses such as cls (b), (c) and (e). According to his submission thus made on the strength of s. 6, General Clauses Act a legal proceeding which had been instituted under the old Act should be continued on the assumption as if the new Act had not been enforced *qua* the subject-matter of the old Act. The learned Advocate General relied on several authorities in support of this proposition. Before we discuss the various authorities cited by him it appears appropriate to mention that the old Act was a temporary Act which was enforced for a limited period initially. The Legislature, however, continued the old Act by passing amending Acts from time to time. The last of such amending Acts was U. P. Act No. 27 of 1971. As a result of this amending Act the period of the application of the old Act was to expire on 30th September, 1973. Before the period of the old Act could expire the Legislature passed the new Act and the State Government by a notification appointed 15th July 1972 as the date of its enforcement. By sub-s. (1) of s. 13 of the new Act the old Act was repealed. The question that now falls for our determination is as to what is the effect of the repeal of the temporary Act. *Crab* in his book 'Statute Law', Sixth Edition at p. 108 has dealt with this topic and has remarked

"As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken up on it and it ceases to have any further effect."

It, therefore, appears that if the life of the temporary Act expires, consequences of the same also get extinguished with the date of its expiry. In *S*

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"The general rule in regard to a temporary statute is that, in the absence of a special provision to the contrary, proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires."

The same is the view taken by the Supreme Court in *State of Uttar Pradesh v Jagamander Das* (2) where MAHJAN, C. J. dealing with a similar controversy about the repeal of a temporary statute, observed:

"When a statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry because that would amount to the enforcement of a repealed or a dead Act. In cases of repeal of statutes this rule stands modified by s. 6 of the General Clauses Act. An expiring Act is, however, not governed by the rule enunciated in that section."

RAJENDRAGADKAR, J. speaking for the Court in *Gopal Chand v Delhi Administration* (3) observed in para 14 of the judgment:

"It is argued that, in dealing with this point, it would not be permissible to invoke the provisions of s. 6 of the General Clauses Act because the said section deals with the effect of repeal of permanent statutes. This argument is well founded . . ."

It, therefore, appears that it admits of no doubt that in the case of a temporary statute the provision of s. 6 of the General Clauses Act are not applicable as this

(1) A.I.R. 1951 S.C. 301. (2) A.I.R. 1954 S.C. 683.  
 (3) A.I.R. 1959 S.C. 600.

section does not deal with the repeal of temporary statutes, and deals only with permanent statutes. It is in the light of these observations of the Supreme Court that we have to consider the various authorities which have been cited by the learned Advocate General. It may be noticed at the very beginning that none of the authorities cited by the learned Advocate General deals with the contingency with which we are faced in the present case.

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The main authority on which great reliance was placed by the learned Advocate General is reported in *State of Punjab v. Mohar Singh* (1). The facts of this case briefly are that in March 1948 an Ordinance under s 88 of the Government of India Act, 1935 was promulgated. This Ordinance made provision for registration of land claims of refugees. S. 7 of the said Ordinance provided that in case any person were to submit incorrect or false claim he would be liable to punishment. This Ordinance was a temporary enactment and was repealed by an Act of the Legislature passed in the year 1948. The new Act which was passed contained all the provisions of the Ordinance. In March 1948 at a time when the Ordinance was still in force, one Mohar Singh filed a claim which was, on subsequent investigation, found to be false. In May 1950 prosecution was launched against him for having filed a false claim. One of the questions which arose for decision before the Supreme Court was, whether the offence having been committed during the period of the Ordinance, could the proceedings launched after the repeal of the Ordinance be continued and Mohar Singh be punished? The Supreme Court applied s 6 of the General Clauses Act and found that Mohar Singh having committed breach of a section of the Ordinance, which

(1) A.I.R. 1955 S.C. 84.

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was subsequently continued by the Act, was liable to be convicted. It was in the background of these facts that the Supreme Court affirmed the conviction under the Act made in a proceeding instituted for breach of the Ordinance after its repeal, but commenced under the Act itself. The law laid down by the Supreme Court in this case was thus in a different context, as in our case we are dealing with a statute which was admittedly temporary and the operation of the same expired on 30th September, 1973.

*Chandrasinh Manibhai v Surajit Lal* (1) is the other case which was relied on. This again is a case where the Supreme Court was considering the provisions of Bombay Rents, Hotel and Lodging House Rents Act, 1947 and its retrospective operation. In considering the provisions of this Act the Supreme Court held that the same had no application to appeals pending at the time when that Act came into force. It was further observed.

"In terms, the provisions of the new Act and the rules made thereunder are made to apply only to such suits and proceedings which are transferred under the provisions of s 50, and its retrospective effect is confined to what is expressly stated in s 50."

We, therefore, find that on the basis of the interpretation of the provisions of that Act their Lordships held that the said Act could not be given retrospective operation. We do not thus find that the learned Advocate General can derive any support from this case.

The third case relied upon is reported in *State of Kerala v N Sami Iyer* (2). The emphasis laid by the learned Advocate General in this case was on the observations of the Supreme Court made in *State of*

(1) A.I.R. 1951 S.C. 199.

(2) A.I.R. 1966 S.C. 1415.

*Punjab v Mohar Singh* (1) which have been approved in this case as well. On this basis it was argued that the line of enquiry would be not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests any intention to destroy them. According to his submission as old rights had not been destroyed the provisions of the new Act did not apply. We are unable to agree with the submission of the learned Advocate General that the old rights, as urged by him, have not been destroyed. We have already pointed out in the earlier portion of our judgment that in relation to certain buildings which are now exempted from the operation of the new Act the Legislature has not conferred any rights to the tenants. It obviously follows from this that in respect of those buildings which were the subject-matter of the previous Act certain rights for protection from eviction had been provided for in the same, but now after the new Act has been enacted the Legislature only has conferred rights on the tenants of those buildings alone to which the provisions of the new Act apply, and to no other. It, therefore, appears to us that the rights of tenants of buildings to which the provisions of the new Act do not apply have definitely been destroyed.

*Bahah v Rangachari* (2) and *Jindas Oil Mill Godhra Electricity Co* (3) are the two other authorities on which reliance has been placed by the learned Advocate General for the submission that when an existing Statute or Regulation is repealed and the same is replaced by a fresh Statute or Regulation unless the new Statute or Regulation specifically or by necessary implication affects rights created under the old law those rights must be held to continue in force even after the new Statute or Regulation comes into force.

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(1) A I R. 1955 S C. 84

(2) A I R. 1969 S C 701

(3) A.I.R. 1969 S C 1225

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For the observations made earlier, we do not think that the said law applies to the facts of the present case on account of the reason that, firstly, we are dealing with the provisions of a temporary Act to which s 6 of the U P General Clauses Act does not apply; and secondly, we definitely find that the rights of tenants in respect of certain buildings have been destroyed and not maintained.

The other two authorities cited by the learned Advocate General are reported in *S B Jain, I. T. O. v. Mahendra* (1) and *R. B Seth Gujar Mal Modi v C. I T.* (2) In these cases, the Supreme Court considered the provisions of s. 297(2) (b) (ii) of the Income Tax Act, 1961, and on the interpretation of the same held that what s 297 (2) (d) (ii) required was the actual pendency of a proceeding under s 34 of the repealed Act. The question whether that proceeding was barred by limitation or not was irrelevant. In view of this opinion, the Supreme Court held in these two cases that since the proceedings under s 34(1) (a) of the Act of 1922 were pending at the time of the commencement of the Income Tax Act, 1961, the Income-tax Officer was not competent to issue fresh notices under s. 148 of the new Income Tax Act. The learned Advocate General had laid emphasis on the factual pendency of a proceeding and had argued on that basis that since actual proceedings of the suit under the old Act were pending on the date of the commencement of the new Act the rights of the parties under the lease should be determined on that basis. The Supreme Court while dealing with the provisions of the Acts mentioned above had laid down the law of factual pendency in relation to the provisions of those Acts. We do not think that the learned Advocate General can get any support from the aforesaid two cases

(1) 83 I.T.R. 104.

(2) 84 I.T.R. 261.

It was then urged that as the old Act was repealed instead of being allowed to expire, the old Act continued to remain alive for the purposes of the proceedings taken under it. On this basis it was attempted to be argued that the provisions of s 6 of the General Clauses Act would still be applicable. We, however, do not find any force in this argument. Section 6 of the U. P. General Clauses Act cannot have the effect of extending the life of the temporary Act beyond the period stated in the temporary Act itself. As a result, therefore, s. 6 of the U. P. General Clauses Act would be effective only up to the original date of its expiry. Hence the only result will be that up to the original date of its expiry rights and liabilities accrued and incurred under the temporary Act before the repeal would be continued to be enforced and proceedings in regard to them would be permitted to be taken in spite of the repeal. It is only to this limited extent that s. 6 of the U P General Clauses Act would be applicable. Taking a view other than the one stated above would result in extending the life of the temporary Act which is not within the power of any Court.

Dealing with a similar controversy the Calcutta High Court in *Tarak Chandra Mukherjee v. Ratan Lal Ghosal* (1) has taken the same view, with which we express our respectful agreement. The relevant facts for the appreciation of the law laid down in this case are that the West Bengal Legislature passed the West Bengal premises Rent Control (Temporary Provisions) Act, 1950. This Act as originally enacted was intended to remain in force till the 31st March, 1953. By subsequent enactments its life was extended up to 31st March, 1956. Normally it would have expired on

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that date, but on that very date, the last day of its existence, it was repealed by the West Bengal Premises Tenancy Act (12 of 1956). That Act and the President's assent to it were first published in the *Calcutta Gazette* of the 30th March, 1956 but it did not come into force on that date since it itself stated in s 1(2) that it would come into force on such date as the State Government might, by notification, appoint. Such a notification dated 30th March, 1956 was published in the official *Gazette* on the 31st March, 1956. It was in this notification that it was stated that 31st March, 1956 was the date on which the Act would come into force. By virtue of that notification and s 6(2) of the Bengal General Clauses Act, the Act of 1956 came into force immediately on the expiration of 30th March, 1956 and it was on that date that the Act of 1950 was actually repealed. Thus immediately after the midnight of 30th March, 1956 the life of the Act of 1950 was brought to an end. The question which arose in these circumstances before the Calcutta Court was as to whether after the temporary Act of 1950 was repealed instead of being allowed to expire did not continue to remain alive for the purposes of proceedings pending at the time of the repeal? The Calcutta Court, dealing with this controversy, laid down the law in the following words:

"From the above it must be clear that where the repealed Act is a permanent Act, the effect of s 8 of the Bengal General Clauses Act is to restore it for the purposes specified, as such Act, unless the repealing Act shows a contrary intention; and upon such restoration of the Act the rights and liabilities accrued and incurred under it before the repeal, can be enforced and proceedings in regard to them can be commenced or continued to completion at or up to any time, unless forbid-



den by the law of limitation or otherwise, the restored Act being a permanent one. But where the repealed Act is a temporary Act, it is restored only as an Act due to expire on the date originally specified. There can be no other effect of deeming the repealing Act as not passed. Upto the original date of its expiry, rights and liabilities accrued and incurred under the Act before its repeal can be enforced and proceeding in regard to them under the Act can be instituted or continued by virtue of s. 8, because by virtue of that section, the Act will remain in force up to that date for the purposes of such rights, liabilities and proceedings. But once that date has passed, s. 8 will have spent itself. The temporary Act will then have expired under its own terms and the position in regard to rights and liabilities accrued and incurred under it before its repeal and in regard to proceedings under the Act respecting them, whether pending or intended, will then be as in the case of an expired temporary statute. Whether or not such rights and liabilities can still be claimed and enforced and whether proceedings under the Act in regard to them can still be instituted or continued, will depend on the general incidents of temporary statutes and the construction of the particular Act."

. The only effect of the repeal was that the Act was maintained in life by s. 8 of the General Clauses Act for the purposes mentioned in the section, upto the date originally fixed for its expiry, that is to say, for the 24 hours of the 31st March, 1956, but no new rights or liabilities could accrue or be incurred during those 24

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hours. Since the 1st April, 1956 the question of enforcing rights and liabilities accrued and incurred under the Act before its repeal and of commencing or continuing proceedings in regard to them has gone back to the realm of the principles applicable to temporary statutes which have expired."

The same view was taken in another Full Bench case of *Rabindra Nath v. Gour Mondal* (1). The relevant portion of the judgment which would apply to the facts of the present case is as follows:

"The effect of the qualifying words 'as if the repealing Act had not been passed' in s 8, Bengal General Clauses Act. is that only so much can be done by virtue of the section as could have been done under the repealed Act if it had not been repealed. Nothing is added, nor is the operation of the repealed Act enlarged in any way. Only that Act, as it was, is revived and thereafter maintained in life for the purposes mentioned in the section with all its limitation necessarily attaching to it both as to duration and as to scope. The repeal does not affect it in regard to rights accrued, liabilities incurred or proceedings in respect of such rights and liabilities, but it remains circumscribed by its own limitations and cannot go further than it could have gone if the repeal had not brought it to an end.

We respectfully agree with the view taken by the Calcutta High Court in these two Full Bench cases and applying the same in the present case hold that as the life of the old Act expired on 30th September, 1973, the rights and privileges, if any, acquired under the old Act could not ensure for the benefit of the

(1) A.I.R. 1974 Cal. 274 (F.B.)

parties after the said date. It is, however, made clear that according to the view which has been expressed above neither the provisions of s. 6 of the U. P. General Clauses Act nor that of s. 13(2)(s) are applicable to the present case and it is only in deference to the argument of the Advocate General that we have indicated the above view relating to the continuation of the old Act till the date of its expiry, i.e., 30th September, 1973.

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Sri Bashir Ahmed has referred to the cases in *Indira Sohanlal v Custodian of Evacuee Property* (1) and *Kalawati Devi v I T. Commissioner* (2) and has argued on the basis of these cases that even though s. 6 of the General Clauses Act would be applicable in cases of repeal but if the new legislation manifests an intention incompatible with or contrary to the provisions of the section then it will not and the incompatibility would have to be ascertained from a consideration of the relevant provisions of the new law. In this connection he relied on a passage in *Indira Sohanlal's case* (1) which is quoted below:

"Thus where . . . the repealing section of a fresh enactment which purports to indicate the effect of the repeal on previous matters provides for the operation of the previous law in part and in negative terms, as also for operation of the new law in the other part and in positive terms, the said provision may well be taken to be self-contained and indicative of the intention to exclude the operation of s. 6, General Clauses Act."

Similar are the observations of the Supreme Court in *Kalawati Devi's case* (2), at p. 168, para. 15, where their Lordships observed:

"It seems to us, however, that by providing for so many matters mentioned above, some in accord

(1) AIR, 1956 SC 77.

(2) AIR 1958 SC 162.

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with that would have been the result under s. 6 of the General Clauses Act and some contrary to what had been the result under s. 6, Parliament has clearly evidenced; an intention to the contrary."

We agree with the contention of *Sri Bashir Ahmed*, and find that the aforesaid two cases cited by him fully apply to the present case. The Legislature in the new Act has provided for all those contingencies, in positive and negative terms in the saving clause contained in s. 43, which it intended to provide for. It is clear that the scheme of the new Act manifests an intention incompatible with or contrary to the provisions of the old Act. Further, the saving clause is exhaustive and clearly manifests an intention to exclude the operation of s. 6 of the General Clauses Act altogether.

A reference may, however, be made to sub-s. (4) of s. 1 of the old Act, which runs as follows:

"(4) It shall cease to have effect on the expiry (30th September, 1973) except as respects things done or omitted to be done before the expiration thereof, and s. 6 of the U. P. General Clauses Act . . . shall apply upon the expiry of the Act as if it had then been repealed by an U. P. Act."

This provision apparently applies s. 6 of the U. P. General Clauses Act upon the expiry of the period of the temporary Act. This sub-section appears to have a limited object as it applies only to a case on expiry of the Act when otherwise not repealed. We now find that after the enforcement of the new Act that by virtue of s. 43(1) of the said Act the old Act has been repealed altogether. Hence it is not possible to apply the aforesaid provision now for any purpose. It may further be pointed out that this provision was made at

a time when the possibility of enacting a new Act was not even envisaged by the Legislature. Since now the old Act has been repealed and substituted by the new Act with substantially different provisions and objectives it would be incorrect to hold that sub-s (4) of s 1 still applies and saves certain rights mentioned therein. The said sub-section has again the limited object of saving "things done or omitted to be done" in the case of the expiry of the old Act as mentioned therein. It is thus to be found that the benefits of s 6 of the U. P. General Clauses Act had to be given only for the limited purpose mentioned therein. It is not that s. 6 of the General Clauses Act was applied for all purposes which are mentioned therein. This is an additional reason that enables us to hold that sub-s (4) of s. 1 does not apply after the repeal of the old Act.

For the reasons mentioned above, we are unable to accept the submission of the learned Advocate General that either because of the saving cl. (s) of sub-s (2) of s. 43 or because of s. 6 of the U. P. General Clauses Act the appeal has to be decided on the basis of the old Act without taking note of the new changes. We, therefore, reject his argument on this aspect of the matter.

The next question that needs our consideration is the determination of the rights of the parties on the basis of the changed position. It may be mentioned that *Sri Bashir Ahmed* made a statement in Court that he was withdrawing all allegations from the plaint which were made by his client initially for eviction of the respondent on the basis of s. 3(1) of the old Act. He subsequently also moved a duly verified application and withdrew the allegations on the aforesaid controversy by the same. We, have, by means of a separate order, allowed the said application. The result of

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allowing of the said application would be that now the rights of the parties have to be decided independently of the provisions of the old Act. Sri *Bashir Ahmed* pressed that the evidence already on record was sufficient for deciding the controversy which would arise under the changed condition. The learned Advocate General contended—and in our opinion, rightly—that the cause of his client would be seriously prejudiced if he was not given an opportunity to fight out the case on the basis of the provisions of the new Act. But we express no opinion whether the defendant can take benefit of the new Act. As noted above, the requirements of the new Act are different than those of the old one and it would thus not be in the interest of justice that we take upon ourselves the task of deciding the rights, without giving the opportunity to the respondent which was sought for before us, on the basis of evidence already on the record. As a matter of fact, there is apprehension of injustice not only being done to the respondent but also to the appellant in case the rights are decided on the basis of the old pleadings and the issues, as well as the evidence. We think that in view of the changed position it would be proper to permit the parties to amend their pleadings if deemed necessary and to ask the court below to frame new issues if arising and to decide the suit after giving opportunity to the parties to adduce evidence on the same.

In view of what we have said above we are not called upon to determine the controversy relating to the application of s. 3 of the old Act to the facts of the present case.

We, therefore, allow the appeal, set aside the judgment and decree of the court below and remand the case to it for decision afresh in accordance with law and in the light of the observations made by us in this

judgment Parties to bear their own costs of this appeal, as well as of the suit incurred so far.

In order to avoid unnecessary technical difficulties we have set aside the whole decree of the court although a part of it was in favour of the appellant. Accordingly now the whole of the suit will be tried by the court below, which we are sure will be decided expeditiously

*Ordered accordingly*

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## APPELLATE CIVIL

*Before Mr Justice S. Chandra and Mr Justice  
A. Banerji*

BHAGWATI DEVI

. . APPELLANT,

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*v.*

*September,  
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PRESIDENT OF INDIA, THROUGH  
THE UNDER SECRETARY TO THE  
GOVERNMENT OF INDIA, MINISTRY OF  
DEFENCE, NEW DELHI AND ANOTHER ... RESPONDENTS.

*Resumption of property in Cantonment—Governor General's order no 170 of 1833, cl 6—Interpretation and conditions upon which the power can be exercised*

Cl 6 of the Governor General's order no 176 of 1836 confers power upon the Government to resume the grant. The grantee's interest can come to an end only after he had been given one month's notice and paid the value of the authorised building. The Government does not acquire the right to take possession of the land on the expiry of one month's notice. The payment of the value of the building is as much a condition as is the giving of one month's notice before the power to resume can be effectively exercised.

*Constitution of India Art. 226—Natural justice—Notice of resumption issued without opportunity to represent the case—Order no. 241.*

Even if there is no provision of any opportunity of being heard in standing order no. 241, the principles of natural

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justice are attracted for proving the market value of the property. Order no 241 shows that the valuation has to be substantiated in a court of law and so it has to be supported by accurate details and the petitioner has to be heard.

Special Appeal No. 30 of 1972 against the judgment and order dated 26th November, 1971 passed by B N Lokur, J, in Civil Miscellaneous Writ No. 520 of 1969

*K. M Dayal*, for the Appellant.

*B N Sapru*, for the Respondents

S CHANDRA, J —The appellant claims that she is the owner in possession of premises no. 23 B I Lines, Meerut Cantonment. On 23rd January, 1969 the Military Estates Officer, Meerut Cantonment, served upon the appellant a notice stating that the Government has decided to resume the property and it required the appellant to hand over possession thereof by 28th February, 1969. A cheque for Rs. 6,650 00 was annexed with the notice as compensation for the various structures standing on the land. The appellant challenged the validity of this notice by way of a writ petition in this Court. A learned single Judge held that the case of the appellant that the land was owned by her as private property and not under an old grant which was subject to cantonment tenure was without merit and was an afterthought. The land was held by the appellant and her predecessors as an old grant subject to cantonment tenure. He held that the old grants were governed by Governor General's Order No. 179, dated 12th September, 1836. This order was in force and is still in force even after the commencement of the Constitution. It was equally applicable to Meerut Cantonment. Construing clause 6 of this order the learned single Judge held that an offer of compensation is merely an offer to take over the buildings if the appellant is agreeable and does not involve the process



of compulsory acquisition The appellant is free to demolish the buildings and remove the bricks and mortar leaving the land in a vacant state to be taken possession of by the Government. There is no compulsion that the appellant must part with the buildings for the value offered The Government has made an offer that the appellant may surrender the buildings in return for the compensation mentioned and it is for the appellant either to accept the offer or to hand over the lands in a vacant state after pulling down the buildings. The learned Judge held.

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"I am unable to agree with the argument that resumption of the lands is conditional upon the payment of the value of the buildings thereon or that the acquisition of the buildings is a necessary concomitant of the resumption of the land . . . . . If the price is not acceptable to the petitioners, they are at liberty to reject the offer and remove the buildings or negotiate for the price."

On these findings it was held that the notice does not disclose any legal infirmity and should not be quashed. The writ petition was dismissed. Aggrieved, the petitioner has come up in appeal.

For reasons mentioned by him we are in agreement with the learned single Judge that the appellant held land subject to cantonment tenure and that Order no. 179 of 12th September, 1836 was still in force and was applicable to the Cantonment of Meerut. We deem it unnecessary to reiterate the reasons given by the learned single Judge in support of this view.

We are, however, unable to agree on the construction of cl 6 of this Order. Cl. 6 is headed as 'Conditions of occupancy'. It reads:

"6 No ground will be granted except on the following conditions which are to be subscribed by

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every grantee, as well as by those to whom his grant may subsequently be transferred:

*Resumption of land:*

1st.

The Government to retain the power of resumption at any time on giving one month's notice and paying the value of such buildings as may have been authorised to be erected "

To us it appears that this clause confers upon the Government power to resume the grant. The power of resumption is conditional upon the giving of one month's notice and on paying the value of such buildings as may have been authorised to be erected. We are unable to construe this clause as conferring an unfettered power of resumption. Clearly, two conditions precedent are to be satisfied before the power of resumption can be exercised. The grantee's interest can come to an end only after he had been given one month's notice and paid the value of the authorised buildings. It cannot hence be said that the Government acquires right to take possession of the land on the expiry of one month's notice. The paying of the value of the buildings is as much a condition as is the giving of one month's notice before the power to resume can be effectively exercised

The learned Standing Counsel invited our attention to the decision of the Delhi High Court in *Sh. Raj Singh v Union of India* (1). With respect, we are unable to agree with the view that the only right of the grantee is to claim compensation and the Government can take possession at any time after the expiry of one month's notice.

Under cl 6 of this order the Government is to pay the value of the buildings. This order does not lay down the criterion or the method of assessing the value.

(1) AIR 1973 Delhi 169.

According to the counter-affidavit filed on behalf of the Government the valuation had been fixed by the Government according to the assessment made by the Military Engineering Service Authorities as provided in Standing Order no. 241, a copy of which is Ann. C to the counter-affidavit. A perusal of this Standing Order shows that the Government took the view that it was necessary to adopt a system that will give the owner a fair compensation for his buildings as such, proper allowance being made for the type of construction and depreciation. As all valuations have to be substantiated in a court of law it was thought essential that they should be supported by accurate details. The Order then proceeds to give detailed instructions as to how the valuation will be estimated. The estimate has to be on the current market rates. It says that the walls, foundations etc. must be examined most carefully by making holes, digging trenches etc. to determine in what manner and to what extent the workmanship and specifications actually incorporated in the buildings differ from the specifications priced in para. 1(b). The age of the building has also to be determined. Its remaining life is then estimated and thereafter the detailed procedure of evaluating the current value is prescribed. It will thus be seen that the assessment of the value of the buildings has to be done objectively, by known standards.

It is evident that the assessment of value of the buildings for paying compensation to the grantee is a proceeding which affects the civil rights of the grantee. In our opinion the principles of natural justice are attracted to such proceedings. It is now well settled that the principles of natural justice apply to administrative proceedings if they affect a person's civil rights. See *State of Orissa v. Dr. (Miss) Binapani Dei* (1) and *A. K.*

(1) A.I.R. 1967 S.C. 1269.

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*Kraipak v. Union of India* (1) It was stated in the latter case that the aim of rules of natural justice is to secure natural justice or to prevent miscarriage of justice.

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J.

The appellant stated in the writ petition that the notice of resumption has been issued to her without giving her any opportunity to represent her case. The petitioner has not been given an opportunity to prove the market value of the property. In reply it has been stated that there is no provision of any opportunity of being heard. The value of the buildings has to be fixed by the Military Engineering Service Authorities as provided in Standing Order no. 241. It is thus clear that though the Government purported to act in accordance with Standing Order no. 241 yet the appellant was not allowed to participate in the enquiry. A perusal of that Standing Order shows that the valuations have to be substantiated in a court of law and so they have to be supported by accurate details. Even though the appellant has challenged the valuation yet no effort has been made on behalf of the respondents to file a copy of the valuation report made by the Military Engineering Service Authorities. According to that assessment the value of the buildings is Rs.6,650, while according to the appellant its value is not less than Rs.1,00,000. In our opinion the principles of natural justice were clearly attracted and they were undoubtedly contravened by the authorities.

The impugned notice was invalid in so far as it proceeded to resume the grant on payment of Rs.6,650 as the value of the structures standing on the said land.

In the result the appeal succeeds and is allowed. The judgment of the learned single Judge is modified

and the writ petition is allowed. The impugned notice dated 23rd January, 1969 is quashed. The parties may, however, bear their own costs.

*Appeal allowed.*

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## APPELLATE CIVIL

*Before Mr Justice Omprakash Trivedi and Mr. Justice  
S. K. Kaul\**

GRAM SABHA, KUDRA .. APPELLANT,

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PARTIES.

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**U. P. Consolidation of Holdings Act, 1953, ss. 9, 11-A and 48—Revision—Scope of—Right or title of Gaon Sabha—No objection under s. 9—Right if can be inquired into at the revisional stage—Bar of s. 11-A.**

*Held*, because the Gaon Sabha had not filed an objection under s. 9 within limitation it was barred by s. 11-A from raising an objection respecting such claim or from being heard respecting such claim at any subsequent stage of the consolidation proceedings and that being so, the Deputy Director of Consolidation could not in exercise of his *suo motu* powers under s. 48 enquire into the right or title of the Gaon Sabha which was not a party to any consolidation proceeding before the subordinate authorities. The scope of power conferred by s. 48 on the Deputy Director of Consolidation to adjudicate upon the regularity, correctness or legality of an order passed by a subordinate consolidation authority must remain confined to matters between the parties before the consolidation authorities and this power cannot extend to persons who are not parties to the consolidation proceedings at any stage or to complete strangers or outsiders to these proceedings.

**Interpretation of Statute—Rule of harmonious construction.**

The well-known rule of interpretation of statutes is that a particular provision of a statute should be so interpreted as to harmonise with the other provisions of the same statute and

\*While sitting at Lucknow.

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not in way that it may render superfluous or nugatory to another provision of the statute.

Special Appeal No 95 of 1970 against the judgment and order dated 3rd December, 1969 passed by LAKSHMI PRASAD, J, in W P. No 648 of 1967.

*B. R Gupta*, for the Petitioner.

*Ch. Akhtar Husain* and *Umesh Chandra*, for the Opposite-parties.

O. P. TRIVEDI, J. —These are four connected special appeals and arise from the judgment and order of a learned single Judge of this Court dated 3rd December, 1969 deciding Writ Petition Nos 636, 637, 638 and 648 all of 1967 filed in the following circumstances:

The dispute between the parties relates to plot nos. 103/1 and 106-A. In the basic year Noor Mohd. and others were recorded as grove-holder of these plots. An objection under s 9 of the U. P Consolidation of Holdings Act (hereinafter called the Act) was filed by Salim Khan who is respondent no 8 of Special Appeals nos 95 and 96 of 1970 and respondent no. 1 of Special Appeals nos 97 and 98 of 1970. He claimed to be the grove-holder of these plots exclusively and contested the title of persons whose names were recorded in the basic year. The Consolidation Officer upheld the objection of Salim Khan holding him sole grove-holder of plot no. 106-A and co-grove-holder in grove plot no. 103/1 with Noor Mohd and others. Two appeals were filed against this decision one by Salim Khan and another by Noor Mohd. Khan and another. The Settlement Officer (Consolidation) held Salim Khan to be the sole grove-holder of both the plots. Against this decision two revisions were filed before the Deputy Director of Consolidation. They were allowed. The decision of the Deputy Director of Consolidation was that

neither Noor Mohd Khan and others nor Salim Khan had any right in or title to the two plots ; plot no. 103/1 was tank and plot no. 106-A was Banjar and these two plots became vested in the Gaon Sabha and that the names of Noor Mohd. and others were incorrectly recorded. The names of Noor Mohd. and others were ordered to be expunged and the name of Gaon Sabha was ordered to be substituted in the plots. It is against this decision that the aforesaid four writ petitions were filed, two of them by Noor Mohd. and others and the other two by Salim Khan. All these four petitions were decided by the learned single Judge by one judgment, and it is this judgment the correctness of which is questioned in the present special appeals before us. The learned single Judge allowed the writ petitions holding that the Gaon Sabha not having filed an objection under the Act the Deputy Director of Consolidation had no jurisdiction under s. 48 of the Act to decide the question of title in favour of Gaon Sabha due to the bar of s. 11-A of the Act. In this regard the learned single Judge also expressed the opinion that Gaon Sabha not having filed an objection under s. 9 of the Act within limitation the entries in the basic year obtaining in favour of Noor Mohd. and others became final and could not be disturbed subsequently by the Deputy Director of Consolidation acting under s. 48 of the Act. Learned counsel for the appellants Sri B. R. Gupta argued before us that the learned single Judge was not correct in this view because s. 48 of the Act confers *suo motu* powers on the Deputy Director of Consolidation to correct any orders passed in consolidation proceedings by lower authorities. No doubt, s. 48 is in terms very widely worded and gives power to the Deputy Director to call for and examine record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the

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filed an objection under s. 9 of the Act within the prescribed time, could not be permitted to file an objection claiming right or title to these plots before the Deputy Director of Consolidation nor could the Gaon Sabha be heard by the Deputy Director of Consolidation on such an objection. It could not be the intention of the Legislature that the policy laid down by it under s. 11-A of the Act should be defeated by exercise of *suo motu* powers by the Deputy Director of Consolidation under s. 48. It will be contrary to all established canons of interpretation of statutes to accept the argument that what could not be achieved by the Gaon Sabha by a belated objection claiming title to this land before the Deputy Director of Consolidation due to the bar of s. 11-A of the Act could be achieved by the Deputy Director of Consolidation through exercise of his *suo motu* power under s. 48. The well-known rule of interpretation of statutes is that a particular provision of a statute should be so interpreted as to harmonise with the other provisions of the same statute and not in way that it may render superfluous or nugatory another provision of the statute. If we are to hold that title respecting claim or right to land could be decided at any stage by the Deputy Director of Consolidation in exercise of his *suo motu* power under s. 48 despite the bar of s. 11-A then such an interpretation will clearly militate against the provision contained in s. 11-A. On the principle of harmonious construction, therefore, we agree with the interpretation placed on s. 48 and the scope of *suo motu* power of the Deputy Director of Consolidation by the learned single Judge and hold that because the Gaon Sabha had not filed an objection under s. 9 within limitation it was barred by s. 11-A from raising an objection respecting such claim or from being heard respecting such claim at any subsequent stage of the consolidation proceedings and that being so,

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regularity, correctness, legality or propriety of any order passed by such authority in the case or proceedings and to make such order in the case or proceedings as he thinks fit But we cannot lose sight of the provision contained in s. 11-A of the Act. S. 11-A is in these terms:

“No question in respect of—

(i) claims to land,

(ii) . . . .

(iii) . . . . .

relating to the consolidation area, which might or ought to have been raised under s. 9, but has not been so raised, shall be raised or heard at any subsequent stage of the consolidation proceedings.”

The substance of the provision is that no person, who has not filed an objection under s. 9 regarding claim to land, partition of joint holding and valuation of plots, trees, wells and other improvements etc. within the period prescribed therefor under the Act, shall be permitted to raise such an objection, nor shall any such objection be heard at any subsequent stage of the consolidation proceedings. We desire to underline the words “at any subsequent stage of the consolidation proceedings which occur in s. 11-A”. These words are so wide as to include stage of proceedings under s. 48 of the Act and without room for controversy enact a bar both to the raising and hearing of an objection in respect of a question or claim to land etc. which could be raised under s. 9 of the Act at any subsequent stage if such a claim has not been raised within the period prescribed therefor. As a result of this bar contained in s. 11-A the Gaon Sabha which admittedly had not

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the Deputy Director of Consolidation could not in exercise of his *suo motu* powers under s. 48 enquire into the right or title of the Gaon Sabha which was not a party to any consolidation proceeding before the subordinate authorities. On the principle of harmonious construction we are of the view that the scope of power conferred by s. 48 on the Deputy Director of Consolidation to adjudicate upon the regularity, correctness or legality of an order passed by a subordinate consolidation authority must remain confined to matters between the parties before the consolidation authorities and this power cannot extend to persons who are not parties to the consolidation proceedings at any stage or to complete strangers or outsiders to these proceedings. In that view of the matter we agree with the learned single Judge in the view that the Deputy Director had no jurisdiction to hold that the land in dispute had become vested in Gaon Sabha and that the name of Gaon Sabha should be substituted in place of Noor Mohd. and others. We do not find any force in the argument of the learned counsel and in the result these appeal must fail.

These special appeals are dismissed with costs to the contesting respondents. This judgment shall govern Special Appeal Nos. 96 of 1970, 97 of 1970 and 98 of 1970 also.

*Appeals dismissed.*

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## APPELLATE CIVIL

*Before Mr Justice G. C Mathur*

JOKHAN PRASAD SHUKLA

AND OTHERS

APPELLANTS,

v.

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October, 9

LAKSHMI DEVI

... RESPONDENT

**Hindu Marriage Act, 1958, ss 11 and 19—Sut by previous wife—Declaration of second marriage of her husband, as void—Sut maintainable—No petition at her instance will lie under the Act**

A petition under s 11 of the above Act is maintainable only at the instance of one of the parties to the marriage which is sought to be declared null and void. A petition by a person who is not a party to the marriage sought to be declared null and void, will not lie under s 11.

*Held*, that a suit filed by the previous wife for declaration that the second marriage of her husband was null and void is not barred by s 19 of the above Act

Second Appeal No 2185 of 1972 from the judgment and decree of M M H. SIDDIQI, Civil and Sessions Judge, Basti, dated 2nd June, 1972, in Civil Appeal No. 119 of 1971.

S R Misra, for the Appellant

B. L. Yadav, for the Respondent.

G. C. MATHUR, J :—Respondent Smt. Lakshmi Devi filed a suit on 20th May, 1969 in the Court of Munsif, Khalilabad at Basti against the appellants. The plaintiff is the wife of appellant no 1 Dr. Jokhan Prasad Shukla. The relief which she asked for in the plaint was for a permanent injunction restraining her husband, appellant no. 1, and Ram Daur appellant no. 2 from performing the marriage of appellant no 1 with appellant no. 3 Km Kusum. On the application of the plaintiff the Munsif granted an interim injunction restraining the performance of the marriage but in spite of this

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injunction the marriage was performed between appellant no 1 and appellant no 3 on 23rd May, 1969 Thereupon, the plaintiff amended her plaint and in place of the relief of permanent injunction sought the relief of declaration of the marriage between appellant no 1 and appellant no 3, as void The trial court framed the following issues

- (1) Whether the defendant no 1 has remarried defendant no 3 during the continuance of his valid marriage with the plaintiff ? If so, its effect ?
- (2) Whether the suit is not maintainable ?
- (3) Whether the court-fee paid is not sufficient?
- (4) To what relief, if any, is the plaintiff entitled ?

The trial court held on issue no 1 that the defendant no 1 had married defendant no 3 on 23rd May, 1969 and that the marriage was void in view of the provisions of s 5(1) of the Hindu Marriage Act On issue no 2 the trial court held that the suit did not lie in the Court of the Munsif It was of opinion that the declaration sought was a declaration under s 11 of the Hindu Marriage Act and that a suit for such a declaration, on account of the provisions of s 19 of the Act lay in the Court of the District Judge The trial court accordingly dismissed the suit Against the decree of the trial court the plaintiff preferred an appeal. The Civil and Sessions Judge allowed the appeal, set aside the decree of the Munsif and decreed the plaintiff's suit He concurred with the findings of the Munsif that the marriage between defendants 1 and 3 was performed on 23rd May, 1969 and that the marriage was void He further held that the suit was cognizable by the Munsif and that the Munsif had jurisdiction to try the same Against the decree of the lower appellate court this second appeal has been filed.

The concurrent finding of fact of the courts below that the marriage between defendant no. 1 and defendant no. 3 was performed on 23rd May, 1969 is a pure finding of fact which is not vitiated by any error of law. This finding is binding in second appeal. The only question which arises for consideration is whether the suit was maintainable in the Court of Munsif or not. S. 19 of the Hindu Marriage Act provides:

“Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together”

This section makes it clear that all petitions under the Act lie in the district court. ‘District Court’ is defined in s. 3(b) thus:

“3 (b) ‘district court’ means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the official *Gazette*, as having jurisdiction in respect of the matters dealt with in this Act.”

Admittedly the Court of the Munsif is not a “district court” as defined in s. 3(b). Therefore, if the present suit is a petition under any of the provisions of this Act then it could only be filed in the district court and not in the Court of the Munsif.

It is urged by learned counsel for the appellants that the suit was competent under s. 11 of the Act. S. 11 provides:

“Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be

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so declared by a decree of nullity if it contravenes any one of the conditions specified in cls (i), (iv) and (v) of s. 5."

A plain reading of this section shows that a petition for declaring a marriage solemnized after the commencement of this Act to be null and void, can be filed by "either party thereto". The expression "either party thereto" clearly means either party to the marriage sought to be declared null and void. A petition under s. 11 is maintainable only at the instance of one of the parties to the marriage which is sought to be declared null and void. A petition by a person who is not a party to the marriage sought to be declared null and void, will not lie under s. 11. The second marriage was between Dr. Jokhan Prasad Shukla defendant no. 1 and Km Kusum defendant no. 3. The plaintiff Smt. Lakshmi Devi, who was admittedly the first wife of defendant no. 1, was not a party to the second marriage. She could not have, therefore, filed a petition under s. 11 of the Act. The suit filed by her for declaration of the marriage between defendants 1 and 3 to be null and void, is not covered by the provisions of s. 11 of the Act and cannot be treated as a petition under that provision. That being so, the ordinary remedy of the plaintiff under the civil law of filing a suit for declaration of the second marriage as null and void, cannot be held to be barred by s. 19 of the Act, which prescribes a special forum for petitions under the Act. In *Lakshmi Ammal v Ramaswami Naicker* (1) a learned single Judge of the Madras High Court has taken the same view. It has been held in this case that the first wife cannot apply under s. 11 for declaring the marriage of the second wife as void and that the first wife can file a suit under the ordinary law for a declaration that the marriage of her husband with the second wife is illegal and void under the Hindu Marriage Act. The

(1) A.I.R., 1960 Mad. 6.

Civil and Sessions Judge has rightly held that the Munsif had jurisdiction to entertain the suit

The second appeal is accordingly dismissed with costs  
The stay order is vacated

*Appeal dismissed*

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### CIVIL REFERENCE (F. B.)

*Before Mr. Justice R. L. Gulati, Mr. Justice K. B. Srivastava, Mr. Justice Jagmohan Lal, Mr. Justice Prem Prakash and Mr. Justice S. K. Kaul \**

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November  
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**U. P. Consolidation of Holdings Act, 1953, s. 5(1)(c)(ii) -**  
*Words "any part"- Meaning of --Transfer of whole holding*  
*--No permission is necessary*

Having regard to the terminology employed in the preceding clause and the succeeding proviso, no other meaning can be assigned to the expression "any part" occurring in s. 5(1)(c)(ii) of the Act except that it means "a part" as distinguished from "the whole". So it is not necessary to obtain the permission of the Settlement Officer (Consolidation) for the transfer of the holding as a whole.

*Munna Lal Shukla v. Deputy Director of Consolidation (1), Ram Behari Shukla v. Munna Lal Shukla (2), Smt. Ashrafunisa Begum v. Deputy Director of Consolidation, Camp at Hardoi (3) and Smt. Rajeshwari v. Deputy Director of Consolidation (4), affirmed.*

*Constitution of India, Art. 348 --Authoritative text: Bill, Acts or Ordinances passed in language other than English - When authoritative--Exclusive competence of Parliament*  
*Authorised translation into English of the Act originally passed in Hindi language-- English translation shall be regarded to be its authoritative text U. P. Consolidation of Holdings Act*

Whenever a question arises as to what is the authoritative text of a particular Act or an Ordinance etc., of a State Legis-

\* While sitting at Lucknow

(1) 1966 A.W.R. 814

(3) A.I.R. 1971 All. 87 (I.B.)

(2) 1968 A.I.J. 223.

(4) 1971 R.D. 130 I.B.

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lature one has to turn to its English translation if it was enacted in a language other than the English language. The authoritative text of Bill, Act or Ordinance of a State Legislature cannot be in a language other than the English language unless the Parliament by law otherwise provides.

The power to declare that the authoritative text of any Ordinance, Act etc., of a State Legislature shall be in a language other than the English language has been vested exclusively in the Parliament. The Parliament has not made any such provision so far. It is beyond the competence of a State Legislature to provide that the authoritative text of its Act and Ordinances etc. shall be in a language other than the English language. The official language of the State of Uttar Pradesh is Hindi, so that the Legislature of this State can pass Ordinance, Acts etc. in Hindi language. Thus even though the U P Consolidation of Holdings Act was passed by the State Legislature in Hindi, yet its translation in the English language shall be regarded its authoritative text and shall prevail over its Hindi version.

—, Art 348 (3)—*Scope of—Words “Notwithstanding anything in sub-cl (b) of cl (1)”—Meaning of—State Legislature prescribing language other than English for use in Bill and Acts etc—Authorised text of—Conflict between—English version shall prevail—U P Language (Bills or Acts) Act, 1950 and U P Official Language Act, 1951.*

The words “notwithstanding anything in sub-cl. (b) of cl (1)” occurring in cl (3) of Art 348 only means that a State Legislature may prescribe any language other than the English language for use in Bills introduced in or Acts passed by the State Legislature and that cl (1)(b) shall not create an impediment in its way. When a Bill is introduced or an Act is passed in a language other than the English language by a State Legislature, an authoritative translation thereof in the English language has to be provided and that translation shall for the purposes of cl. (1)(b) be deemed to be the authoritative text thereof.

When there is conflict between the English version of a Statute of a State Legislature and its version in a local language, the version in English language will prevail over the version in the local language.



Reference to Full Bench arising out of W. P. No 398 of 1966 under Art. 226 of the Constitution of India.  
*C. S. Tewari*, for the Petitioner

*B. R. Gupta*, for the Opposite parties

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GULATI, J : This is a petition under Art. 226 of the Constitution arising out of proceedings under the U. P. Consolidation of Holdings Act (hereinafter referred to as the Act).

One Smt. Dhanraj Kuer died leaving some grove and agricultural plots which she had inherited from her husband. She had acquired *bhumidhan* rights in respect of the agricultural plots before her death. During the consolidation proceedings the Gaon Sabha, Jehwa moved an application before the Consolidation Officer claiming that as Smt. Dhanraj Kuer had died heirless her entire holding vested in the Gram Samaj. The original petitioners—Bhagwan Singh and Lalloo Singh filed objection denying claim to the estate of the deceased widow on the basis of

(i) inheritance being her husband's brother's sons' sons

(ii) Will executed by Smt. Dhanraj Kuer on 12th October, 1962 in favour of Bhagwan Singh;

(iii) registered sale deed dated 4th April, 1963 executed by Smt. Dhanraj Kunwar in respect of her entire holding including groves in favour of the petitioners.

The petitioners' objection was rejected and the claim of the Gaon Sabha was upheld. The appeal filed by the petitioner was dismissed by the Settlement Officer (Consolidation) and then revision under s. 48 of the Act was also dismissed by the Deputy Director of Consolidation by his order dated 26th March, 1966. The petitioner then moved the present writ petition.

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When the writ petition came up for hearing before HARI SWARUP, J he noticed that one of the questions that arose in the case was as to whether the widow was competent to transfer the whole of her agricultural holding without the prior permission of the Settlement Officer (Consolidation) as required by s 5(1)(c)(ii) of the Act

S 5(1)(c)(ii) of the Act enacts that no tenure-holder, except with the permission in writing of the Settlement Officer (Consolidation) previously obtained shall transfer by way of sale, gift or exchange any part of his holding in the consolidation area. Full Bench of this Court in *Smt Asharfunisa Begum v Deputy Director of Consolidation, Camp at Hardoi* (1) has taken the view that the expression "any part of his holding" did not include the entire holding so that the ban applied only where a part of holding was transferred and not when the holding was transferred as a whole. The learned Judge noticed the Hindi version of s 5(1)(c)(ii) of the Act which reads:

"NA CHAKBANDI KSHETTRA ME SAM-  
 MILIT APNI JOT ATHWA USKE KISHI  
 BHAG KO VIKRAYA DAN ATHWA BINIMAY  
 DWARA HASTANTARIT KAREGA "

According to the Hindi version the ban would apply as much to the transfer of a part of the holding as to the whole. In his opinion the words in the English version were not clear and it was possible to interpret them in accordance with the Hindi version of the enactment. He accordingly referred the matter to Full Bench and that is how this petition has come up before us.

To bring with, we might state that although the learned Judge has not indicated as to whether the entire case has to be decided by the Full Bench or only the question relating to the interpretation of s 5(1)(c)(ii) of

the Act, yet having regard to the fact and the circumstances of the case the intention of the learned Judge was to refer only the limited question relating to the interpretation of s 5(1)(c)(ii) and not the whole case, because even if the petitioners fail on this ground their alternative pleas will have to be examined. We shall accordingly restrict ourselves to the short question as to whether the ban incorporated in s 5(1)(c)(ii) applies to the transfer of an agricultural holding as a whole or applies only when a part of the holding is transferred. Cl (c) of s 5(1) was added in the Act by s 4 of the U P Consolidation of Holdings (Amendment) Act, 1958 (U P. Act no XXXVIII of 1958) and reads as under

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“(c) Notwithstanding anything contained in the U. P. Zamindari Abolition and Land Reforms Act, 1950, no tenure holder, except with the permission in writing of the Settlement Officer (Consolidation) previously obtained shall--

(i) use his holdings or any part thereof for purpose not connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming, or

(ii) transfer by way of sale, gift or exchange any part of his holding in the consolidation area

Provided that a tenure-holder may continue to use his holding, or any part thereof, for any purpose for which it was in use prior to the date specified in the notification issued under sub s (2) of 4 ”

It may at once be noticed, that cl. (ii) is flanked by cl (i) and the proviso at the end of cl (ii), cl (i) and the proviso deal with the ban on non-agricultural use of a holding while cl (ii) imposes a ban on the transfer of

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a holding In cl (i) the expression used is "holding or any part thereof" The same expression is used in the proviso, which in fact, is a proviso to cl (i) so that ban on the user of agricultural holding for non-agricultural purpose extends to the holding as a whole as also to a part thereof But when we come to cl (ii) the expression used is "any part of his holding" Obviously the ban contemplated under cl (i) is not co-extensive with the ban contained in cl. (ii) otherwise there is no reason why the expression "holding or any part thereof" should not have been used in cl (ii) also The expression "holding or any part thereof" is not synonymous with the expression "any part of the holdings" if regard is had to the jurisdiction of cl (ii) If cl (ii) had stood alone it could be possible to interpret the expression "any part of the holding" as meaning every part of the holding But having regard to the terminology employed in the preceding clause and the succeeding proviso, no other meaning can be assigned to it except that it means "a part" as distinguished from the whole It is true that grammatically, the expression "a part" would have been more apt than the expression "any part" But when the intention of the Legislature is clear, nothing will turn upon this grammatical error According to the dictionary meaning also "any" is some times used for the adjective "a" It is not necessary however, to dwell upon this point any further because the question has been the subject-matter of previous decisions of this Court which have unanimously interpreted the expression "any part" to mean "a part" The first decision is of G. D. SAIGAL J in *Munna Lal Shukla v Deputy Director of Consolidation* (1) His Lordship held that the prohibition in cl (ii) of s. 5(1)(c) extended to the transfer of a part of the holding and not to the whole holding so that the whole holding could be transferred by a tenure-holder

(1) 1966 A W R. 818,

without the permission of the Settlement Officer (Consolidation) This decision has been affirmed on special appeal by OAK, C J and U. S SRIVASTAVA, J in *Ram Behari Shukla v Munna Lal Shukla* (1) The question was again considered by another Full Bench of which two of us were members in the case *Smt Asharfumisa Begum* (2) when the view taken in the earlier cases was affirmed There is yet another decision of a Full Bench of this Court consisting of S N DWIVEDI, G S LAL, and R. B. MISRA, JJ in *Smt Rajeshwari v Deputy Director of Consolidation* (3) The Full Bench agreed with the view taken by the earlier Full Bench in the case of *Smt Asharfumisa Begum* (2) Thus so far this Court is concerned, the matter stands concluded

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If one has regard to the object underlying the provisions in question it becomes quite clear as to why the ban in cls (i) and (ii) is not co-extensive The object underlying cl. (i) is to preserve the land for agricultural purposes and that is why a complete ban has been placed on the use of the land for non-agricultural purposes A ban on a part of the land only would not have served the purpose Under cl. (ii) the ban was intended to prevent the fragmentation of holdings and, as such, it was placed only on a transfer of a part of the holding There could be no objection to the transfer of the holding as a whole because it would not involve fragmentation but would involve only a change in ownership The scheme underlying the Act was to consolidate agricultural holdings and to prevent their further fragmentation and also to preserve the land for agricultural purpose It was not the intention to restrict the right of an owner to deal with his property by way of sale, exchange or transfer except to the extent that was necessary to carry out the objects of the Act That is why a ban of a limited nature has been placed on transfers

(1) 1968 A.L.J. 228

(2) AIR 1971 All 87 (F B)

(3) 1971 R.D. 180

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while a complete ban has been placed on the use of agricultural land for non-agricultural purposes. Having regard to all these circumstances it is not possible to take a different view.

The learned counsel for the petitioners submitted that the law having been settled by a series of decisions of this Court it should not be unsettled by taking a different view as it would lead to a lot of confusion and give rise to a spate of litigation. For this he relied upon the decision of the Supreme Court in *Raj Narain v. Sant Prasad* (1) where it has been observed:

“ . . . to take a contrary view from the law laid down would have the effect of unsettling the law established for a number of years. In the matter of interpretation of a local statute the view taken by the High Court over a number of years should normally be adhered to and not disturbed. A different view would not only introduce an element of an uncertainty and confusion it would also have the effect of unsettling transactions which might have been entered on the faith of those decisions. The doctrine of *stare decisis* can be invoked in such a situation.”

There is a lot of force in this contention also but it is not necessary to invoke the doctrine of *stare decisis*, because we are of the firm view that there is no ambiguity whatsoever in the language in which this provision is couched and having regard to all the facts and the circumstances of the case it is not possible to interpret it differently.

It is no doubt true that the Hindi version is in conflict with the English version. The Hindi version expressly says that the ban shall apply to the holding as a whole and as also to a part thereof. The question arises as to whether in such a situation we should give preference to the English version or to the Hindi version.

(1) A.I.R. 1978 S.C. 291.

For this purpose we have to turn to Art 348 of the Constitution. It is necessary to reproduce that Article. It enacts:

"348. (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(a) all proceedings in the Supreme Court and every High Court,

(b) the authoritative texts—

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language

(2) Notwithstanding anything in sub-cl (a) of cl (1) the Governor of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purpose of the State, in proceedings in the High Court having its principal seat in that State

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court

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(3) Notwithstanding anything in sub-cl (b) of cl (1) where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in para (iii) of that sub-clause a translation of the same in the English language published under the authority of the Governor of the State in the official *Gazette* of that State shall be deemed to be the authoritative text thereof in the English language under this Article "

Under this Article two things have been provided. First all proceedings in the Supreme Court and in every High Court have to be in the English language, except when under cl (2) the Governor of a State with the previous consent of the President authorises the use of the Hindi language or any other local language in proceedings in the High Court of that State. We are not concerned with that question in this case. Secondly the authoritative text of all Bills and Acts of the Parliament and of the State Legislature has to be in the English language. However the State Legislatures are authorised to prescribe any language other than the English language for this purpose, but, in such an event cl (3) provides that a translation in the English language of any Bill introduced in or Act passed by a State Legislature in a language other than the English language has to be published under the authority of the Governor of the State in the official *Gazette* of the State and such translation shall be deemed to be the authoritative text of such a Bill and Act. Whenever a question arises as to what is the authoritative text of a particular Act or an Ordinance etc. of a State Legislature one has to turn to its English translation if it



was enacted in a language other than the English language. The authoritative text of Bill, Act or Ordinance of a State Legislature cannot be in a language other than the English language unless the Parliament by law otherwise provides. Thus the power to declare that the authoritative text of any Ordinance, Act etc. of a State Legislature shall be in a language other than the English language has been vested exclusively in the Parliament. The Parliament has not made any such provision so far. The official language of the State of Uttar Pradesh is Hindi, so that the Legislature of this State can pass Ordinance, Acts etc. in the Hindi language. Thus even though the U. P. Consolidation of Holdings Act was passed by the State Legislature in Hindi, yet its translation in the English language shall be regarded its authoritative text and shall prevail over its Hindi version.

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The learned counsel for the respondents referred to Arts. 345, 346 and 347 of the Constitution. Art. 345 makes a provision for official language of a State and provides that the State Legislature may by law adopt any one or more of the languages in use in the State or the Hindi as the language or languages to be used for all or any of the official purposes. Art. 346 makes a provision about the official language for communication between one State and another or between a State and the Union. In Art. 347 a provision has been made that on a demand being made the President may direct that a language other than the English language shall be officially recognised in a State or any part thereof for such purposes as may be specified. These Articles have no bearing upon the question before us. We are not concerned with the official language of a State but are concerned with the question of the language in which

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the Bills and Acts have to be passed by a State Legislature and that subject has been specifically dealt with in Art 348, which provides that notwithstanding anything in the foregoing provisions of this part of the Constitution, all Acts etc shall be in the English language. It is thus clear that the provisions contained in Arts 345, 346 and 347 are subject to the provisions contained in Art. 348.

The other argument is that in cl (3) of Art 348 the use of words "notwithstanding anything in sub-cl (b) of cl (1)" suggests that this clause will override cl (1). This interpretation is not correct. It only means that a State Legislature may prescribe any language other than the English language for use in Bills introduced in or Acts passed by the State Legislature and that cl (1)(b) shall not create an impediment in its way. As we have already indicated above, when a Bill is introduced or an Act is passed in a language other than the English language by a State Legislature, an authoritative translation thereof in the English language has to be provided and that translation shall for the purpose of cl (1)(b) be deemed to be the authoritative text thereof. Indeed, it will be beyond the competence of a State Legislature to provide that the authoritative text of its Act and Ordinance etc shall be in a language other than the English language, because such a power vests only in the Parliament. Thus, when there is a conflict between the English version of a Statute of a State Legislature and its version in a local language the version in English language will prevail over the version in the local language. A Division Bench of this Court in *Saghu Ahmad v The Government of the State of U P* (1) while referring to Art 348 of the Constitution has at p 278 in para 89 observed,

"In view of this provision of the Constitution the

(1) AIR 1954 All 257

notification appearing in English must prevail over the notification appearing in Hindi ”

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A Full Bench of this Court in *Jaswant Sugar Mills Ltd, Meerut v. The Presiding Officer, Industrial Tribunal (II), U P, Allahabad* (1) has held that in U P after the passing of the U. P. Act no 1 of 1950 (U P Language Bills Act) and 26 of 1951 (U P Official Language Act) the State Legislature has prescribed Hindi as the language for the official use in the State, and both, the Hindi version as also the English translation of a Bill or Act etc published in the official *Gazette* are valid and authorised and both of them can be looked into and put to official use. There is no competition between the two. It is only in case of conflict or divergence between the two versions that the English version may reign supreme and supersede the Hindi one. Following this Full Bench decision a learned single Judge in *Medical Officer of Health, Municipal Corporation, Agra v Gulzari* (2) has held that although Hindi was the official language of the State of U P in case of divergence between the Hindi and the English versions, of the official *Gazette* the English version reigned supreme and superseded the Hindi version. The same view has been taken by the Rajasthan High Court in *Bhikam Chand v State* (3) and the Madhya Pradesh High Court in *Messrs Govindram Ram Prasad v Assessing Authority (Sales-tax)* (4).

This being the position we are clearly of the opinion that in the present case it is the English text which shall prevail over the Hindi version and according to the English text the expression “any holding” occurring in

(1) AIR 1969 All 240

(3) AIR 1968 Raj 142

(2) AIR 1965 All 170

(4) AIR 1958 MP 16

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cl. (ii) of s. 5(1)(c) of the Act does not include the "whole holding" so that it is not necessary to obtain the permission of the Settlement Officer (Consolidation) for the transfer of the holding as a whole

With this answer, we direct the writ petition to be placed before the learned single Judge for disposal

*Question answered*